



Constitutional Negotiations in Canada and South Africa;

A Comparative Analysis

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Comparative and International Politics

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ABSTRACT

The achievement of a negotiated settlement in South Africa and the negotiation of a new constitution in the mid-1990's piqued the interest of students of conflict resolution and constitutional politics throughout the world. Similarly, numerous failed attempts to achieve a package of amendments to Canada's constitution have attracted the attention of scholars seeking to explain why the attempts have failed and where Canada's future lies. The purpose of this study was to compare the negotiations that took place in both South Africa and Canada to explain why South Africa succeeded in negotiating a new Constitution, whereas Canada has been unable to amend its Constitution despite repeated attempts.

The study applied the social-psychological model of negotiation and bargaining to both cases and isolated variables in four areas to allow for a comparative analysis. The four dimensions of negotiation and bargaining that were explored were: (1) structural factors, (2) behavioural dispositions, (3) interdependence factors, and (4) social influence strategies. The data used for the comparative analysis was collected through a review of selected literature produced on the South African and Canadian constitutional negotiations.

The results indicated that the negotiations in South Africa and Canada were both successful in terms of producing an agreement, however Canada failed in achieving ratification of the agreement by the populous. The independent variables in the social-psychological model indicated a number of areas in which South Africa had advantages over Canada in terms of possible success factors. The explanation of why Canada failed is rooted in a disconnect between the perceptions of the negotiators and the perceptions of the general public on the cost of failure.

Aside from conclusions on the reasons for Canada's failure in negotiating a new constitution versus Canada's success, this study makes recommendations for both South Africa and Canada on lessons that can be learned from each nation's experience. The author recommends further research into the area of comparative constitutional politics through the investigation of further cases and the application of alternative theoretical frameworks to the cases examined in this study.

University of Cape Town

CHAPTER ONE - INTRODUCTION

On October 26th, 1992, Canada was confronted with one of the most significant threats to its national unity since it was created through Confederation in 1867. A slim majority (54.3%)¹ of Canadians voted against a package of constitutional amendments that had been the product of over two years of consultation and negotiation and had been supported by the federal government and all ten provincial governments, the three largest federal parties of the day and leaders of the business and labour communities. The Charlottetown Accord, which had been billed as Canada's best hope of achieving a settlement to the constitutional stalemate that had plagued it for decades, had been rejected by the Canadian population.

Peter Russell, one of Canada's foremost constitutional scholars, has commented that the Charlottetown Accord "may very well be the last time this generation of Canadians attempts a grand resolution of constitutional issues in order to prevent a national unity crisis."² While constitutional fatigue may dissuade Canadians from entering into another round of constitutional negotiations willingly, Russell also acknowledges that Canadians may be forced into another round of negotiations if Canada is confronted with an actual, rather than an apprehended, national unity crisis.³

As evidenced by the 1995 Quebec Referendum, in which of the residents of Quebec voted against sovereignty by a narrow margin (0.06 percent, or 54,288 votes)⁴, Canada's hold on national unity is tenuous indeed. The time may come in the not-too-distant future when Canada is again forced into the quest for a constitutional solution to a national unity

¹ Kenneth McRoberts and Patrick Monahan, eds., The Charlottetown Accord, the Referendum, and the Future of Canada (Toronto: University of Toronto Press, 1993, Appendix 3: Official voting results by province, 26 October 1992.

²Peter H. Russell, "The End of Mega Constitutional Politics", PS 26(1) (March 1993), 33.

³ Ibid

⁴ Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997), xi.

crisis. The challenge will be to either find a package of constitutional amendments that accommodates the concerns of French Canadians and Aboriginals or be faced with the consequence – continuing national discord and potentially disintegration.

Before Canada confronts its next unity crisis, it is worth casting an eye to other countries that have confronted threats to their existence and have prevailed through negotiated settlement. For those who believe that Canada's constitutional predicament can not be resolved, it will be useful to examine how other nations have resolved more seemingly intractable problems. A fitting case in point is South Africa.

Statement of the Problem

The central question of this thesis is the following:

Why did South Africa succeed in negotiating a new Constitution, whereas Canada has been unable to amend its Constitution despite repeated attempts?

In order to answer this question, we will look at the circumstances surrounding the constitutional negotiations in the two countries and the views of scholars on the factors which led to their respective success or failure.

Intuitively, it would seem that Canada should have been able to solve its constitutional conundrum more easily than South Africa was able to resolve the devastating conflict in which its inhabitants have been embroiled for generations. Although Canadian authors lament "the difficulty of achieving comprehensive constitutional change in a deeply segmented country such as Canada"⁵, South Africa is arguably far more deeply segmented. This, compounded with ongoing violence, a transition from authoritarianism, and the need to negotiate a new constitution from scratch, should have placed the odds firmly against South Africa negotiating a new constitution with greater ease than Canada. And yet on May 8th,

⁵McRoberts and Monahan, 1993, 5.

1996 South Africa's Constitutional Assembly approved a new permanent constitution, whereas despite decades of negotiations, Canada has yet to negotiate a new constitution that achieves ratification.

The prescriptive aspect of this study will be to explore whether any of the factors that led to South Africa's success can be employed to resolve Canada's constitutional stalemate. Although the original intent of this work was to determine what Canada could learn from South Africa's experience, as the research has proceeded it has become apparent that there are also lessons that South Africa can take from Canada's experience. At some point in the future, South Africa may contemplate constitutional change and one can only hope that South Africa's leaders will learn from the difficulties that Canada has encountered.

In terms of the Canadian case, our focus will be on the period extending from the commencement of negotiations on the Meech Lake Accord in 1987 to the failure of the Charlottetown Accord in 1992. For the purposes of background information, it will also be necessary to look at some key constitutional negotiations from Confederation in 1867 to the repatriation of the Constitution in 1982.

The scope of the South African case will cover the period from the commencement of the Convention for a Democratic South Africa (Codesa) in 1991 to the proclamation of the new permanent Constitution in 1996. Particular attention will be given to the Kempton Park negotiations in 1993, as this is when the interim constitution and the processes for negotiating the permanent constitution were agreed to. Although the negotiations around the permanent constitution are also interesting and were included in the research for this study, the final constitutional negotiations were in large part a refinement of the agreements that were at Kempton Park and thus the earlier rounds have been accorded greater attention.

Organization of the Study

We will begin in Chapter 2 by setting out the theoretical framework that will guide the study – the social-psychological approach.

In Chapter 3, we will discuss the methodology employed in this study and some of the limitations that the methodology presents. In particular, we will look at the historical case study approach, comparative analysis and the types of data collection used.

In Chapter 4, we will begin to explore the background to the Canadian and South African conflicts. We will undertake a historical analysis of both the Canada-Quebec question and the South African apartheid question. We will then look at some of the key political developments in both countries and examine some of the historical differences and similarities between Canada and South Africa.

Chapter 5 will be focused on the actual constitutional debates and negotiations in both countries. We will apply the social-psychological approach to examine the factors which impacted South Africa's political transformation and Canada's gradual political evolution and evaluate the impact of the political negotiation processes in Canada and South Africa.

Finally, in Chapter 6 we will summarize the key findings of this study, discuss what Canada and South Africa can learn from each other in this area and outline implications for future research.

CHAPTER TWO – THEORETICAL FRAMEWORK

The complexity of the subject matter dictates the need for a theoretical framework to guide this study. We will be utilizing the Social Psychological approach as a tool to understand the “variables that may affect the course and character, of bargaining and negotiation at the interpersonal, intergroup and international levels.”⁶

This framework was chosen due to its usefulness in explaining how the attitudes and perceptions of the actors involved in the negotiation, including the negotiators themselves, the groups that they represent, and the general public, can influence the negotiating process. We will use this framework to argue that differences in the manner in which actors perceived the conflicts and potential solutions in Canada and South Africa are key to understanding why one nation was able to successfully negotiate a new constitution while the other was not.

Rubin and Brown set out the key elements of the social psychology of bargaining and negotiation.⁷ They begin by identifying the prominent characteristics of a bargaining relationship as follows:

1. *At least two parties are involved;*
2. *The parties have a conflict of interest with respect to one or more different issues;*
3. *Regardless of the existence of prior experience or acquaintance with one another, the parties are at least temporarily joined together in a special kind of voluntary relationship;*
4. *Activity in the relationship concerns: a) the division or exchange of one or more specific resources and/or b) the resolution of one or more intangible issues among the parties or among those whom they represent;*
5. *The activity usually involves the presentation of demands or proposals by one party, evaluation of these by the other,*

⁶ Jacob Bercovitch, “Problems and Approaches in the Study of Bargaining and Negotiation”, *Political Science*, Vol. 35, No. 2 (December 1984), 129.

⁷ Jeffrey Rubin and Bert Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975).

*followed by concessions and counterproposals. The activity is thus sequential rather than simultaneous.*⁸

Our two cases clearly exhibit these 5 characteristics of bargaining relationships. In both cases, more than two parties are involved, each having a conflict of interest with respect to one or more issues. These parties are joined together in a voluntary relationship – as demonstrated by their participation in several formal rounds of negotiations. In the case of the South African negotiations, there were two main parties, the African National Congress (ANC) and the National Party (NP)/South African Government (SAG), and a number of less central (though still important) parties, including the Democratic Party (DP), the Inkatha Freedom Party (IFP), and the delegations from the independent homelands. In the case of Canada, the federal government and the 10 provinces have been permanent members of the constitutional negotiations, with other parties such as Canada's aboriginal peoples joining in on occasion.

Activity in both the Canadian and South African negotiating relationships involves conflict over both the division or exchange of specific resources and the resolution of intangible issues. Both nations have been engaged in what Peter Russell terms *mega constitutional politics* and which "goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based."⁹

The fact that these negotiations deal with intangible issues rather than the exchange of resources makes the negotiations themselves more complicated and solutions more elusive. As Stein observes, "symbolic goods in constitutional matters

⁸ Rubin and Brown, 18.

⁹ Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto, University of Toronto Press, 1993), 75.

such as charter of rights, an amending formula, or a reformed senate are more difficult to negotiate, since they are not readily quantifiable or divisible."¹⁰ He further notes that intangible issues can not be measured or valued in numerical terms and then broken down into smaller units and allocated in an equitable manner among the negotiating parties.

Finally, the activity in both cases does involve the sequential presentation of demands and proposals, evaluation of these demands and then concessions and counterproposals. In both cases, this process elapsed over a number of years and several rounds of negotiations, both formal and informal, were conducted.

Dependent and Independent Variables

The most useful aspect of the social-psychological approach for the purposes of the study is the identification of dependent variables (criteria of bargaining effectiveness) and independent variables (factors affecting bargaining effectiveness).

Rubin and Brown set out to identify the most commonly used dependent and independent variables in experimental research on bargaining. The authors examine four paradigms – the prisoner's dilemma game, the parcheesi game, the acme-bolt trucking game and the bilateral monopoly game. They found that the two most common measures of bargaining effectiveness have been:

- 1) the number of co-operative or competitive choices made throughout the total number of trials; and,
- 2) the magnitude of the outcomes obtained by the bargainers.¹¹

¹⁰Michael Stein, "Canadian Constitutional Renewal, 1968-1981: A Case Study in Integrative Bargaining." (Research Paper, Queen's University Institute of Intergovernmental Relations, 1989), 8.

¹¹ Rubin and Brown, 34.

The criteria for bargaining effectiveness for this study will be dealt with in Chapter Five, when we apply the Social-Psychological framework to our cases and set out how we will define a successful constitutional negotiation.

Rubin and Brown group independent variables in the social-psychological approach around four underlying dimensions. The authors identify the first dimension as the “structural context within which bargaining occurs.”¹² Structural factors include such things as the presence of audiences, the role of third parties, the existence of coalitions, the location of and physical arrangements at the bargaining site, variations in the types of threat and communication options available, time limitations and the duration of bargaining sessions, incentive magnitude and reward structure, the number of issues at stake (as well as their presentation and format), and the prominence of alternative solutions.¹³

The second dimension is “the behavioural predispositions of the parties involved.”¹⁴ As Rubin and Brown state, “there is little doubt that personality variables, as well as other individual characteristics are important determinants of bargaining behaviour.”¹⁵ Bercovitch refers to this set of variables as “personal factors” and argues that we can break them down into two micro-categories “a) individual characteristics (age, religion, intelligence, etc.), and b) individual motives and attitudes (eg. trusting, co-operative, authoritarian, etc.).”¹⁶

The third dimension is “the nature and underlying characteristics of the bargainers’ interdependence.”¹⁷ This includes such factors as whether or not the participants in the negotiation are acquainted with one another, whether they have

¹² Rubin and Brown, 34.

¹³ Ibid, 37.

¹⁴ Ibid, 34.

¹⁵ Ibid, 37.

¹⁶ Bercovitch, 130.

¹⁷ Rubin and Brown, 34.

informal contact outside of the negotiating process, whether they are predisposed to acting in a co-operative, competitive or individualistic nature and what the distribution of power and dependency is in the negotiating relationship.¹⁸

Finally, there is the “use of social influence and influence strategies in bargaining.”¹⁹ This dimension involves the effects of various strategies such as co-operative, competitive, deterrent, rewarding, punitive and coercive.²⁰ Complex analyses using these variables can involve the use of various strategies at different stages of the negotiation.

The purpose of this theoretical framework will be to enable us to isolate significant variables in each of the two cases that we are examining and to compare these variables in order to determine similarities and differences.

In Chapter 5, we will be using several variables in each of the four dimensions of the social-psychological model to analyze the South African and Canadian negotiations.

¹⁸ Rubin and Brown, 38.

¹⁹ Ibid, 34.

²⁰ Ibid, 39 and Bercovitch, 132.

CHAPTER THREE - METHODOLOGY

Having established the theoretical framework for this study in Chapter Two, this chapter will identify the methodology to be used.

Comparative Analysis

The primary methodological technique that we will employ in this study is comparative analysis. The comparative approach can be a powerful analytical tool, however it is also wrought with pitfalls of which the comparativist must be aware. It is the intention of the author to show that a comparative analysis be useful in isolating some of the factors that account for the success of one constitutional negotiation and the failure of another. In conducting this study, however, we will remain cognisant of both the strengths and weaknesses of comparative analysis.

First of all, it is important to ensure that the cases being compared are truly comparable. We will demonstrate later in this study that in this instance, a good parallel exists between South Africa and Canada. The problem of comparable cases is commonly referred to as ensuring that one is not 'comparing apples to oranges'. More precisely, Arend Lijphart states that comparable cases must be "similar in a large number of important characteristics (variables) which one wants to treat as constants, but dissimilar as far as those variables are concerned which one wants to relate to each other."²¹

One of the major potential weaknesses of our study is the fact that the cases are dissimilar on a number of levels. What we must ask for the purposes of this study is whether the similarities that do exist are sufficient to warrant a comparative

²¹ Arend Lijphart, "Comparative Politics and the Comparative Method", American Political Science Review, vol. 65 (1971), p. 687.

analysis of the two cases. This question will be addressed at the end of Chapter Four, once a historical analysis of the two cases has been undertaken.

Another difficulty with comparative analysis is the small number of cases and large number of variables that are generally involved. One can question whether any useful generalizations can be produced from studies that focus on only two or three cases. Unfortunately, time and resource constraints result in almost all comparative analysis taking place using only a few cases. In fact, the field of comparative politics is dominated by single-case studies. Collier states that “this concern with analyzing few cases appears to derive in part from the types of large-scale political phenomena commonly studied by scholars of comparative politics...a small number of cases is studied either because these phenomena occur relatively infrequently or because, even if they are more common, it is believed that they are best understood through the close analysis of relatively few observations.”²² Indeed, constitutional negotiations are phenomena so complex that to undertake a comparison of more than two cases would necessitate either an enormous expenditure of time and resources or the limitation of the study to only a few variables. For the purposes of this study, we have chosen to limit the cases to two in order to take into consideration a larger number of variables while keeping the study to a manageable scope.

We would agree with scholars who argue that studies based on a small number of cases can raise interesting questions and propose hypotheses that can later be tested through application to further cases.²³ It is possible to engage in fruitful comparative analysis using only two cases. It is important, however, to avoid making sweeping

²² David Collier, “The Comparative Method: Two Decades of Change”, In *Comparative Political Dynamics*, Rustow and Erickson, Eds., 7.

²³ See Collier, Lijphart and Harry Eckstein, “Case Study and Theory in Political Science.” in *Handbook of Political Science*, Vol. 7, Fred Greenstien and Nelson Posby, eds. Reading, Mass.: Addison-Welsey (1975), 79-87.

generalizations, in recognition of the fact that we are working from the small sample of only two cases of constitutional negotiations.

The study of complex socio-political phenomena can also present difficulties by necessitating either the manipulation of a large set of variables or the selection of a smaller set of important variables. The latter situation can result in studies that become unmanageable and overly descriptive, whereas the former can result in oversimplification.

William Sewell describes this as the problem of multiple causation. He describes two strategies that are generally used to analyze social revolution. Analysts either employ a "hierarchical strategy" in which the primacy of one type of cause is asserted over the others, or a "narrative strategy", which attempts to "recount the course of the revolution in some semblance of its real complexity." We must keep this tension between oversimplification and overwhelming detail in mind whenever we undertake analysis of complex phenomena.

Types of Data Analysis

The data collection for this study was undertaken through a review of selected literature produced on the South African and Canadian constitutional negotiations. Sources were collected on the topics of negotiation and bargaining, the case study approach, the methodology of comparative politics and the historical backgrounds of both South Africa and Canada. The texts of the negotiated constitutional accords and related agreements, both ratified and rejected, were also examined.

Limitations of the Study

The complexity of the subject matter under question required us to put some limitations on the study in order to make it manageable. Due to the constraints of the approach that was employed, there are resulting limitations in how the conclusions reached in this study can be more broadly applied. As discussed above, this study is constrained by the problem faced in much of comparative research as we are dealing with few cases and an almost limitless number of variables.

In our selection of variables for this study, we may have neglected other variables that also had an impact on the outcome of the cases. Although the social psychological approach gives us a set of variables that we feel are best suited to the research question at hand, the use of alternative approaches may have yielded other answers. We feel that with the examination of complex phenomena such as constitutional negotiations, the use of a theoretical framework is useful as a simplifying mechanism, however there is a danger that oversimplification can occur and the richness of the case can be lost.

Since our study is limited to only two cases, we can not hope to achieve conclusions with broad applicability. Rather, it is hoped that this study will yield conclusions about our specific cases and raise questions that other researchers might examine with respect to other cases.

Another constraint that we face in conducting this study is the fact that relatively little time has elapsed since the negotiation of South Africa's new Constitution. It is a dynamic time in South Africa and we do not have the benefit of sufficient elapsed time to evaluate the durability of the negotiated settlement. We must conduct our study with the information currently available and hope that future scholars re-evaluate the success of South Africa's settlement at a later date.

In terms of data collection, the study is limited by the fact that we were not able to access primary sources, such as conducting interviews with the parties to the negotiations. In lieu of direct interviews, the personal accounts of parties to the negotiations, such as autobiographies and published interviews, were utilized wherever possible.

Definition of Terms

The analysis of the South African and Canadian conflicts have occupied the attention of numerous scholars and will not be the particular focus of this work. Rather, we will be focussing on the efforts to negotiate an end to the conflicts. Thus, it is important to be clear about what we mean by *negotiation*.

Giliomee and Schlemmer argue that the term *negotiation* is contentious with regard to South Africa. They contend that *negotiation* is very widely interpreted and has been used to describe everything from "the mere consultation of blacks by whites in regard to the conditions of their continued domination or of black's exclusion from power" to "those who are interested only in white capitulation to the demands for unqualified majority rule." Ottoway agrees that the two sides "attached very different meanings to the term *negotiations*."²⁴

In one of the most noted texts on negotiation and bargaining in the social-psychological tradition, Rubin and Brown treat negotiation and bargaining and synonymous terms. They define bargaining as "the process whereby two or more parties attempt to settle what each shall give and take, or perform and receive, in a transaction between them."²⁵ Another proposed definition of bargaining and

²⁴Marina Ottoway. South Africa: the Struggle for a New Order. (Washington: Brookings Institution, 1993), 166.

²⁵Rubin and Brown, 2.

negotiation is offered by Stephenson and Morley, who state that it is "any form of verbal (or non-verbal) communication, direct or indirect, whereby parties to a conflict of interest discuss, without resort to arbitration or other judicial processes, the form of any joint action which they might take to manage a dispute between them."²⁶

Both of these definitions are useful, however the second is more appropriate for our study because it focuses on the management of a dispute arising out of a conflict of interest and specifies that the action takes place without resort to arbitration. This definition applies to both of the cases that we are studying without being overly broad. It should be noted that these definitions of terms are selective and contextually positioned within the parameters of the two cases – South Africa and Canada.

In order to answer the central question of this study, it is also necessary to define what we mean by a "successful" negotiation. This definition will be set out in Chapter Five of this study as we begin to apply our theoretical framework to the cases at hand.

We should also note, that throughout this study we have used common abbreviations for some of the actors in the cases being examined. This includes the African National Congress (ANC), the National Party (NP), the South African Government (SAG), the Inkatha Freedom Party (IFP), the Democratic Party (DP), the Government of National Unity (GNU) the Bloc Quebecois (BQ), the Parti Quebecois (PQ) and Working Groups (WG). In all cases where an abbreviation is used, the full term will be used in the first instance, followed by the abbreviation in parentheses.

²⁶Morley and Stephenson, *The Social Psychology of Bargaining* (London, 1977), 26 - as cited by Bercovitch.

CHAPTER FOUR – HISTORICAL BACKGROUND

The purpose of this chapter is to set the historical context for the constitutional negotiations that we will be examining. It is exceedingly difficult to understand the negotiations in question without being familiar with the long path that led both nations to the negotiating table. Thus, this chapter will provide the reader with a brief overview of key political events in the history of both South Africa and Canada.

The comparison of the histories of South Africa and Canada can also help to address the methodological question raised in Chapter Three: *Are these two cases sufficiently comparable for the purposes of our study?*

Historical Analysis of the Canada-Quebec Case

As with most societies in conflict, it is impossible to understand the political questions being faced by Canada today without a basic understanding of the historical events that have led to our current predicament. In a recent book, Kenneth McRoberts argues that “the roots of the present crisis [of national unity] lie in decisions made in the 1960s”.²⁷ Others would argue that while decisions along the way have exacerbated the conflict, Canada’s national unity crisis can be traced back to its very birth as a polity.

The provinces and territories that would become Canada were confederated as a nation in 1867 under the British North America Act. The constitution was negotiated behind closed doors in Charlottetown, Prince Edward Island, by twenty-three delegates from New Brunswick, Nova Scotia, Prince Edward Island and Canada. The delegations included both government and opposition members.²⁸

²⁷ McRoberts, 1997, xii.

²⁸ Russell, 1993 (1), 22.

The new plan for a federal union included three basic elements: a division of legislative powers that assigned the residual power (powers not explicitly mentioned) to the federal legislature rather than to the provinces, a two-chamber federal parliament with an elected lower house based on representation by population and an appointed upper house based on regional equality, and a central (federal) government that would assume the debts and some of the assets of the provinces.²⁹

After the Charlottetown Conference, the Quebec Conference was held to work out the specifics of the British North America Act, particularly aspects of the constitution dealing with federalism. The constitution changed very little between the conclusion of the Quebec Conference and the enactment of the BNA Act by the British Parliament.³⁰

The BNA Act contained a number of provisions for minority rights that reflect an effort to accommodate the dual visions of French and English Canadians.³¹ English Canadians were given the right to use their language in the legislative and legal institutions of Quebec and French Canadians the right to use their language in the corresponding federal institutions. Protection for denominational schools, of both the Protestant minority in Quebec and the Catholic minority in Ontario, was also set out in the BNA Act. French Canada's distinctiveness was given further recognition through the protection of Quebec's system of civil law (in contrast to the rest of Canada's common law system).

One of the major voids in the BNA Act, which would become significant in future years, is the lack of an amending formula. Since Canada's constitution was to be an imperial statute, the Fathers of Confederation assumed that it would be

²⁹ Russell, 1993 (1), 22.

³⁰ Ibid, p. 26-30.

³¹ Ibid, p. 26-27.

amended by the British Parliament.³² For most of Canada's history, the only route to an amendment of the constitution was through Westminster.

The ratification of the BNA Act itself by the colonial legislatures was a political rather than a legal requirement. Some commentators of the day called for a general election to be held before the enactment of the constitution to ensure popular support, however this idea was rejected by the leading politicians.³³ Peter Russell, one of Canada's foremost constitutional experts, argues that "the Confederation compromise was sheltered from the strain of a full public review in all sections of the country, but at the cost of not forming a political community with a clear sense of its constituent and controlling elements."³⁴ This lack of public consultation, which also characterized the negotiation and enactment of South Africa's 1997 Constitution, may have facilitated the creation of a new nation, however it also laid the groundwork for future constitutional malaise.

Although the public was not directly involved in the ratification of Canada's Constitution, it was subject to approval by both houses of the Canadian legislature. Although the House of Commons approved the Constitution by a margin of 91 to 33, support among French-Canadians was much lower, with 27 in favour and 21 opposed.³⁵

Debate in the legislatures of the future Atlantic-Canadian provinces (New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island) was contentious. In the end, the legislatures of PEI and Newfoundland voted not to enter confederation at that time, New Brunswick's Legislative Council (though not its elected assembly)

³²Russell, 1993 (1), p. 27.

³³ Ibid, p. 27.

³⁴ Ibid, p. 27-33.

³⁵ Ibid, p. 28.

voted to enter confederation and Nova Scotia's Premier managed to manoeuvre the province into confederation despite widespread opposition within the province.³⁶

The BNA Act was passed by the British House of Commons and House of Lords in March 1867 and was proclaimed in effect on July 1st 1867. With a few amendments and additions, the BNA Act has formed the basis of Canada's constitution for the past 131 years. In short, Canada's Constitution was drafted through closed-door negotiations, was subject to a piece-meal ratification process by the legislatures of the day and was never put to a public referendum. By the standards of today, the process of confederation appears less than democratic. As Russell puts it "the Dominion of Canada was born, but the constitutional process that brought it into existence provided a thin and uncertain foundation for the birth of a people."³⁷

As Canada gradually evolved from a "dominion" within the British Empire to an increasingly sovereign nation, the challenge of repatriating Canada's constitution became increasingly important. The major sticking point was the inability of the governments of Canada, including the federal government and the provinces, to agree on how Canada would amend its constitution in the absence of the British Parliament. Conferences on this subject were held in 1935, 1950 and the early 1960's. No agreement was reached.

In the mid-1960's, the issue of repatriating the constitution became entangled with a host of other constitutional issues, beginning the era of "mega-constitutional" politics in Canada. Whereas most of Canada's first century was marked with low-level, low-key constitutional politics, the 1960's ushered in a new era in which Canada

³⁶ Russell, 1993 (1), 29-30.

³⁷ Ibid, 31.

attempted to reach "agreement on the identity and fundamental principles of the body politic."³⁸

Changes in Quebec, which was undergoing what historians have termed the 'Quiet Revolution' also created the impetus for constitutional change. Within Quebec, demands were being made that the provincial government push for greater constitutional powers for Quebec as part of the province's struggle for *épanouissement*, or national survival and expansion.³⁹

Similarly, English Canada was experiencing the birth of a new Canadian nationalism based on Canada's increasing prominence on the international scene as a "broker among nations and a peacekeeper".⁴⁰ However, "unlike Quebec nationalism, this nationalism lacked a clearly defined notion of a people or a national society".⁴¹

Uneasiness on the part of the federal government about the new Quebec nationalism led to new efforts to set a new tone in the Canada-Quebec relationship, including constitutional change.⁴² In 1964, the federal government and its ten provincial counterparts agreed to a complex amending formula that became known as the "Fulton-Favreau" formula. It looked as though the end of Canada's constitutional repatriation struggle was in sight, however the agreement on an amending formula fell apart when Quebec withdrew its support. Quebec nationalists felt that to agree to the Fulton-Favreau formula would be a strategic error because it would make it more difficult for Quebec to achieve the constitutional changes required for nation-building.

In 1968, the election of Pierre Trudeau as Prime Minister of Canada would introduce another change to the face of constitutional politics in Canada. Trudeau, a

³⁸Russell, "The End of Mega Constitutional Politics in Canada?" in *The Charlottetown Accord, the Referendum, and the Future of Canada*, Kenneth McRoberts and Patrick Monahan, eds. (Toronto: University of Toronto Press, 1993) 212.

³⁹Stein, 14.

⁴⁰McRoberts, 1997, 37.

charismatic figure from Quebec with a very definite vision of Quebec and its place in Canada, would shape constitutional politics in Canada for the next two decades. Pierre Trudeau was a vehement opponent of Quebec nationalism and a true believer in Canadian federalism.⁴³ During his time as Prime Minister, Trudeau opposed making special concessions for Quebec and favoured the creation of a bilingual nation with equal rights for English and French speakers throughout Canada. In a recent book, Kenneth McRoberts, a noted Canadian political scholar, argues that “the roots of the present crisis lie in decisions made in the 1960’s. More specifically, they lie with Pierre Elliott Trudeau’s ‘national unity’ strategy, at the centre of which was an attempt to implant a new Canadian identity.”⁴⁴ Later in this study we will argue that one of the most significant barriers to constitutional change in Canada has been a fundamental disagreement over whether our country constitutes two nations (Quebec and the Rest of Canada), ten equal provinces, or a number of regions (Western Canada, Ontario, Quebec, Atlantic Canada).

With Prime Minister Trudeau at the helm, a new round of efforts at constitutional change were undertaken. Another tentative agreement was reached by all provinces and the federal government in Victoria, B.C., in 1971. Again, Quebec's Premier withdrew his province's support for the constitutional agreement when nationalist opposition in the province mounted.⁴⁵ The federal government remained committed to garnering unanimous support among the provinces for any package of constitutional amendments, and thus did not at this time choose to repatriate the constitution unilaterally.⁴⁶

⁴¹ McRoberts, 1997, 37.

⁴² Ibid, 39.

⁴³ Ibid, 61-64.

⁴⁴ Ibid, xii.

⁴⁵ Russell, 1993(1), 91 and McRoberts, 1997, 145.

⁴⁶ Russell, 1993(1), 90.

Between 1971 and 1980, the federal government made several attempts to repatriate the constitution and hamper the growing independence movement in Quebec.⁴⁷ These efforts would ultimately fail and the federal government would reconsider its commitment to unanimous provincial agreement.

In 1980, the Parti Quebecois held a referendum on sovereignty for Quebec, in which 60% of the province's residents voted in favour of remaining as a Canadian province.⁴⁸ In the wake of the Quebec nationalists' referendum defeat, Prime Minister Trudeau moved to implement his own program of constitutional reform. He bypassed the Premiers, building public support for his "People's Package" and threatening to hold a national referendum.⁴⁹ Only when urged to do so by the Supreme Court of Canada did the Prime Minister enter into negotiations with the provincial premiers. Trudeau made some modifications to the federal proposals and managed to garner the support of all of the provinces except Quebec. Despite Quebec's disagreement, Canada repatriated its constitution in 1982 with a new amending formula and a Charter of Rights and Freedoms.⁵⁰

Thus began the modern era of Canada's constitutional politics. Despite having a constitution that now resided in the hands of Canadians, and which Prime Minister Trudeau bragged would "last a thousand years"⁵¹, Canada's troubles were far from over. Many Quebecers would never forgive the federal government or the rest of Canada for proceeding with repatriation without the consent of the country's second most populous province. Two major rounds of constitutional negotiations have not remedied the situation.

⁴⁷ See McRoberts, 1997, 148-154.

⁴⁸ Ibid, 159.

⁴⁹ Russell, 1993(2), 214.

⁵⁰ McRoberts, 1997, 169-164.

⁵¹ Pierre Trudeau, as cited in Russell, 1993(1), 127.

It is worth noting that it is not just the province of Quebec that was opposed to the 1982 repatriation of the constitution. Aboriginal peoples also felt that their rights and interests were not sufficiently incorporated into the Constitution Act, 1982. This would serve as an obstacle to the ratification of the next round of constitutional negotiations, the Meech Lake Accord.

The 1982 Constitution did contain a recognition that further work would be required to identify and define the rights of aboriginal Canadians. This led to a federal-provincial conference in March 1983 which produced a constitutional amendment that greatly enhanced the rights of aboriginal peoples. However, these enhanced rights fell short of "the growing constitutional aspirations of Canada's aboriginal peoples."⁵²

James Hurley strongly argues that between 1968 and 1987, "no clear pattern for the negotiation of multilateral discussions emerged."⁵³ Hurley contends that the various constitutional rounds prior to 1987 used processes varying from multilateral executive federalism (in 1968-72, 1978-79 and 1980), secret bilateral executive federalism (1975-76), unilateral process with broad public involvement (1980-81) and extended executive federalism (1983-1987). Thus, there was no commonly agreed upon means through which constitutional amendments should be negotiated. Hurley urges that this must be kept in mind when assessing the Meech Lake exercise.⁵⁴

Implications – Canada's Historical Background

We will discuss the later years of Canada's "constitutional odyssey" in Chapter Five. Before we address the later years, however, let us summarize briefly

⁵²Russell, 1993(1), 131.

⁵³ James Hurley, *The Canadian Constitutional Debate; From the Death of the Meech Lake Accord of 1987 to the 1992 Referendum*, Ottawa: Minister of Supply and Services Canada, 1994. p.6

⁵⁴ Ibid, 6-7.

some of the most important implications of Canada's historical background.

Canada was born out of an uneasy negotiated settlement among elites. At the time of confederation, Canada was based on a "double compact" between English Canada and French Canada.⁵⁵ In future years, however, English Canadians would come to see Canada not as a partnership between two nations (English Canada and French Canada), but as a union of ten equal provinces. Regionalism also played a part, with some Canadians identifying most strongly as Western Canadians, Atlantic Canadians, Central Canadians (Ontario) or Quebecers. Aboriginal Canadians would insist that they be accorded the rights inherent in their status as Canada's "first nations" (i.e. the first residents of the territory that Canada occupies).

If the early years of Canada's constitutional negotiations taught us anything it is that reaching agreement is exceedingly difficult. Furthermore, an agreement reached through a process that is not seen as legitimate by one or more parties can have negative ramifications for years to come. The less-than-democratic means through which Canada's first constitution was achieved have left us with a legacy of continuing disagreement over to fundamental questions such as "what is Canada" and "how should sub-polities within Canada relate to one another"?

The very fact that Canada's constitutional issues have remained unresolved for so many years bring use to another important point. Despite the fact that Canada's political leaders have been compelled on numerous occasions to enter into negotiations, there has never been great urgency on the part of all parties to achieve a negotiated settlement. Along the way, one or more parties has always felt that the status quo was preferable to an imperfect settlement. We will come back to this point

⁵⁵ McRoberts, 1997, 138.

later in this study when we answer the question of why South Africa has succeeded where Canada has failed.

The “Canada-Quebec” question is a complex one and has been the subject of over a century of disagreement. While this study will not seek to answer this question, it is hoped that an understanding of the equally complex questions faced by South Africa and some of the steps that have been taken towards resolution of that nation’s crisis will help Canadians to put their own national unity issues into perspective.

Historical Analysis of the South African Case

The South African constitutional negotiation is widely viewed as a “small miracle” for what it accomplished - “a conflict-ridden society in which neither of the two big blocs seemed to value democracy as a goal in itself has negotiated a constitutional state, with an agreed bill of rights, underpinned by a surprising degree of agreement on the rules for settling political differences.”⁵⁶

As “miraculous” as it was, the path to a negotiated settlement was not a direct one. There were numerous failed attempts to resolve the South African conflict, both with the assistance of third parties and without. For the purposes of our study, it is important to note how intractable the South African conflict seemed to many observers. This should offer hope to those who believe that Canada’s conflict is irresolvable. Steven Friedman comments that “South Africa did not seem, through the 1980s, a likely candidate for peaceful constitutional change.”⁵⁷ He adds that strategists and conventional wisdom assumed that the only resolution for the conflict

⁵⁶ Steven Friedman and Doreen Atkinson. *The Small Miracle: South Africa’s Negotiated Settlement*. (Johannesburg: Ravan Press, 1994), xiii.

⁵⁷ *Ibid.*

would be either reform, which meant that the minority would continue to rule, or revolution, with liberation forces overthrowing the apartheid state. Fortunately for South Africa, another political option was chosen.

This chapter will focus on the negotiations that resulted in a new constitution for South Africa. As background to these negotiations, it will be necessary to look briefly at the history of South Africa's conflict and the significant pre-cursors to formal constitutional negotiations, including the National Peace Accord (May 1990) and the Convention for a Democratic South Africa, or Codesa, (December 1991-May 1992).

One of the most difficult aspects of telling the story of South Africa's path to a negotiated settlement is deciding where to begin. South Africa is a nation that has been embroiled in conflict of various forms virtually since its inception and the journey that has led to the creation of a new nation has been a long one.

As in most deeply divided societies, the roots of South Africa's current conflict can be traced to its birth as a state. Rather than recount South Africa's history from the time that Jan van Riebeck landed at the Cape of Good Hope in 1652 to the adoption of Apartheid as a state policy in the 1940's to the Sharpeville massacre and the banning of the ANC in 1960, we will focus on the modern events that lead to the demise of Apartheid and the birth of a new state.

According to some commentators, the story of South Africa's negotiated settlement begins in Soweto in 1976. Ralph Lawrence argues that this is when domestic and international resistance to Apartheid gained renewed vigour and set into motion a train of events which would lead to the end of Apartheid.⁵⁸ The Soweto

⁵⁸ Ralph Lawrence, "Introduction: From Soweto to Codesa" in *The Small Miracle: South Africa's Negotiated Settlement*, Steven Friedman and Doreen Atkinson, eds. (Johannesburg: Ravan Press, 1994). 1-3.

uprising began as a student demonstration against the use of Afrikaans as a medium of instruction in Soweto's schools. The uprising that emerged lasted over a year and left more than six hundred people dead.

The significance of the Soweto uprising is that it produced a surge of black opposition, including the enlistment of an estimated 14,000 young blacks who fled to join the ANC in exile.⁵⁹ The death of Black Consciousness leader Steve Biko while in police custody in September 1977 had a similar coalescing impact on black opposition by heightening the resolve of the black resistance.

In the wake of the Soweto uprising, the South African government made modest concessions in an effort to ease black opposition, including the recognition of black trade unions, the easing of the policy of job reservation, the incorporation of Indian and Coloured minorities with their white counterparts in a tricameral parliament and the elimination of some features of "petty apartheid", such as segregated facilities.⁶⁰ These concessions were not sufficient to stem the tide of resistance.

In fact, some have argued that the mobilisation of opposition grew partly because of, not in spite of, these reforms.⁶¹ In particular, the 1984 constitution, with its creation of a tricameral parliament, was "seen as a vehicle for permanent black exclusion"⁶² and resulted in the formation of the United Democratic Front (UDF), which became an influential force in the fight against Apartheid.

⁵⁹ Patti Waldmeir. *Anatomy of a Miracle*. London: WW Norton & Co., 1997, 23.

⁶⁰ Donald L. Horowitz. *A Democratic South Africa? Constitutional Engineering in a Divided Society*. (Berkeley: University of California Press, 1992), 18. and J.E. Spence, ed. *Change in South Africa*. (Pinter Publishers: London, 1994), 2.

⁶¹ Lawrence, , 4.

⁶² Ibid.

Resistance organizations emerged in the townships in the early 1980s and adopted the goal of rendering “black areas- and presumably the whole country – ‘ungovernable’.”⁶³ The turmoil in the townships spurred the government to the realization that it was losing control.

In 1986 South Africa seemed to be on the verge of a breakthrough in settling its ongoing conflict. The government acknowledged that Black South Africans could no longer be denied a place in the governance of the nation. The Eminent Persons Group from the Commonwealth seemed to have pushed the government towards negotiations with the ANC. Unfortunately, the conditions for settlement were not yet right. The government was not convinced that the cost of sustained conflict outweighed the cost of granting some form of meaningful political power to the black majority.⁶⁴

Thus the conflict worsened before resolution became possible. The government began military action aimed at ANC camps in neighbouring countries. A state of emergency was instituted by the government. The ANC contemplated military strategies which would no longer be restricted to military targets. A negotiated settlement seemed a distant hope.

During the late 1980's, a number of domestic and international developments would create an environment in which a negotiated settlement was possible. The fall of communism and the continuing impact of sanctions led both the ANC and the government to conclude that a negotiated settlement was preferable to protracted conflict.⁶⁵ These factors will be examined in greater detail in Chapter Five.

For some analysts, the beginning of South Africa's constitutional negotiation

⁶³ Friedman et al., The Long Journey: South Africa's Quest for a Negotiated Settlement (Johannesburg: Ravan Press, 1993), 6.

⁶⁴ Ibid, 7.

⁶⁵ Ibid, 10-13.

process was marked by F.W. de Klerk's speech to Parliament on February 2nd, 1990.⁶⁶ In that historic and unexpected speech, the President announced the unbanning of the ANC and other related organizations and the release from prison of political prisoners, including Nelson Mandela.

De Klerk's speech set in motion a process that would result in South Africa's first non-racial elections on April 27th, 1994. Although the story of how this bold move by De Klerk became possible is a fascinating one, the focus of this study will be on the events starting with the first meeting of the Convention on a Democratic South Africa (Codesa) in December 1991 and culminating with the proclamation of the permanent constitution.

Once the South African Government and the ANC had agreed that negotiations towards a new South Africa were necessary and possible, the two parties could not agree on how a new constitution should be negotiated. The ANC favoured a constitution negotiated by a constituent assembly elected through universal franchise. The NP feared that the interests of its constituents would not be fairly represented by a body elected through majority rule. It favoured a multi-party conference as the body to draft a new constitution. This fundamental disagreement accounts for the nearly two-year delay before the commencement of constitutional talks.⁶⁷

The deadlock was broken when the ANC made a statement in January 1991 agreeing to "an 'all-party congress' to negotiate the route to a constituent assembly."⁶⁸ Unfortunately, this breakthrough would be temporary, as the ANC broke off

⁶⁶Spence, 1.

⁶⁷Friedman et al, 1993, 14.

⁶⁸Ibid, 15.

negotiations in May on the grounds that the government was complicit in the continuing political violence.⁶⁹

Throughout the negotiations, violence would act as both impetus and obstacle. While the escalation of violence was a constant reminder to the negotiators of the costs of not reaching a settlement, it was also a source of discord and mistrust between the negotiators.⁷⁰

From May until September of 1991, formal negotiations were suspended. The foundations for multi-party talks were finally laid in September when the political parties committed themselves to the National Peace Accord, a commitment to a joint peace effort. Over the next few months the parties worked out the logistics of the negotiating forum, which would be called the Convention for a Democratic South Africa. This was the end of the pre-negotiation, or "talks about talks", phase.⁷¹

Role of the International Community

Through the 1980s and 1990s, international opposition to Apartheid steadily grew, as did the influence of foreign powers on South African politics. In the 1980's, this involvement primarily took the form of economic, military and cultural sanctions by South Africa's major trading partners as well as direct military and financial aid to the liberation movements on the part of Soviet bloc nations.⁷²

A more direct form of intervention was attempted in 1986 with the Commonwealth Eminent Person's Group, which attempted to broker a peaceful

⁶⁹Ibid.

⁷⁰Welsh, 24-25.

⁷¹Ibid, 17.

negotiated settlement between the ANC and the South African Government. Although the suggested course of change set out by the EPG is similar in many respects to the course eventually adopted, the South African Government felt that the price was far too high.⁷³ It was not yet prepared to accept the concessions that would be required to achieve a negotiated settlement.

Rather than accept the EPG's suggested strategy, the South African Government ordered raids on purported ANC camps in the neighbouring nations of Zambia, Zimbabwe and Botswana. The SAG's actions resulted in a strengthening of international sanctions against the policies of apartheid.

Other attempts at direct intervention by various Western nations through the end of the 1980s were equally unsuccessful, however events in the international community would prove influential. Many observers agree that the weakening of the Soviet Union during this period both provided the ANC with added insecurity, since it derived a great deal of economic and military support from the Soviet bloc, and provided the SAG with added comfort. This assisted in drawing the parties closer to the negotiating table.

Another international development that has been credited with facilitating the commencement of negotiations was the achievement of a settlement in Namibia. This both lessened the ANC's perceived military threat by eliminating ANC bases in Angola and proved to the SAG that "high risk diplomatic strategies could produce major dividends."⁷⁴ The SAG's participation in the Namibian settlement also accorded the government some renewed status in the international community and

⁷²Chris Landsberg, "Directing from the Stalls? The International Community and the South African Negotiating Forum" in *The Small Miracle: South Africa's Negotiated Settlement*, Friedman and Atkinson, eds. Johannesburg: Ravan Press, 1994. 277.

⁷³Friedman, 1993, 5.

⁷⁴Landsberg, 280.

created optimism in Pretoria that the government could build on this status by beginning to negotiate with the ANC.

Exactly what the impact of international sanctions was on pushing the SAG towards the negotiating table is a matter that has been debated among academics. What is generally agreed is that the sanctions and the prospect of continued isolation raised the costs of the policies of apartheid. Although the sanctions themselves may not have been sufficient to bring about a negotiated settlement, combined with other factors they played a role in convincing the SAG that the costs of not entering into negotiations were simply too high. Friedman said it well when he stated that sanctions were better suited to bringing the government to the bargaining table to its knees.⁷⁵

The international sanctions were also influential in expediting the negotiation process once the SAG was set in its course towards negotiation. The timing of F.W. de Klerk's historic speech provides evidence of this. In October 1989, the U.S. advised President de Klerk that he would face severe sanctions unless, by early 1990, he released all political prisoners, unbanned the liberation movements and lifted the state of emergency.⁷⁶ De Klerk delivered a speech in which he carried out all of the prescribed actions in February 1990.

According to Landsberg, the view that De Klerk's move was the direct result of changed international circumstances and foreign influence is simplistic.⁷⁷ He argues that it was domestic concerns that propelled the SAG towards negotiations, however once domestic change had begun the international dimension was an important stimulus.

⁷⁵Friedman, 1993, 11.

⁷⁶Africa Confidential, October 1989, as cited by Landsberg, 280.

⁷⁷Landsberg, 281.

Once the government had committed itself to negotiations, a cascade of crumbling sanctions and increased international contact acted as positive reinforcement for the South African Government. The easing of South Africa's isolation increased the influence of foreign governments on the actions of both the SAG and the ANC. This would become increasingly important as the negotiation process encountered setbacks.

Besides helping to create the preconditions for negotiation and helping to keep the process moving along, the involvement of foreign governments in the provision of information to the negotiating parties proved to be enormously influential. As South Africans explored various models of governance, the international community helped to clarify options and dispel misconceptions.

For the ANC, this involved providing information on how federalism functions in a number of nations throughout the world, including the U.S., Australia, Germany, Switzerland and Canada. The invitation of ANC negotiators to visit some of these nations was aimed at demonstrating that the federalist model would not necessarily lead to the continuance of apartheid below the national level of government. The United States took the extraordinary measure of expressing its belief that "a federal-type system seemed appropriate for South Africa"⁷⁸ because it believed that there was a need to clarify misconceptions about federalism in South Africa.

The international community also sought to clarify misconceptions held by the South African Government. These misconceptions related mainly to the functioning of the Swiss constitutional system. A Chris Landsberg argues, "the SAG's early insistence that power-sharing should be enshrined in the constitution, for example,

⁷⁸The Star, 18/5/93 as cited by Landsberg, 288.

was motivated by a 'clear misunderstanding of the Swiss structures, which the international community was obliged to correct.'⁷⁹

During the most difficult phases of the negotiations, there was a role for the international community as monitor and, to a lesser extent, as mediator. The violence in the townships provided the UN with impetus for direct intervention on several occasions.⁸⁰ International monitors under the auspices of the UN were somewhat effective in encouraging restraint at public demonstrations, however they were not able to end the violence or prevent large scale massacres such as that which occurred at Bisho in September 1992.

The involvement of the international community in the period preceding the negotiations and while the negotiations were occurring, helped to contribute to a sense of urgency in achieving a negotiated settlement and is one of the factors that we will point to in explaining South Africa's success.

Implications – South Africa's Historical Background

What are the primary implications about the South African question that we can draw from the historical background? First of all, we can see that the South African conflict has deep roots and was not easily addressed. This should be carefully noted by Canadian observers who feel that Canada's historic conflicts are too complex and fundamental to be resolved through negotiation.

Secondly, we can see that the great shift from a negotiated settlement seeming a distant possibility to it becoming an attainable reality occurred largely due to a change in the perceptions of the parties to the conflict, both at the elite level and among the general public. The perceived cost of continued conflict became too high

⁷⁹ Landsberg, 288.

to bear and both sides became prepared to make certain concessions to bring about a peaceful settlement. We will examine the role of perceptions in more detail in Chapter Five.

Thirdly, we would argue that the role of the international community in putting pressure on the negotiating parties to achieve a negotiated settlement increased the sense of urgency of the negotiators and of the general public and played an important role in keeping the negotiations from becoming derailed during difficult periods.

Comparative Historical Differences

Before we proceed with our study, it is important to address a question raised in Chapter Three – do our two cases have enough in common to be the subject of comparative analysis? Let us look briefly at some of the key characteristics of the two countries.

One of the key similarities between the two countries is that they are both deeply divided societies. Horowitz states that “a racially and ethnically divided society, South Africa is polarized along ideological lines within and across racial groups.”⁸¹ In his book on constitutional engineering in South Africa, Horowitz makes a comment about South Africa that rings true for the Canadian case as well. He observes that

“There is a conflict in South Africa that has something to do with race. That is about as far as agreement runs among many of the participants and interpreters of the conflict. Beyond that, there is disagreement over the extent to which the conflict is really *about* race, as opposed to being about oppression merely in the guise of race, or about nationalism

⁸⁰Adrian Guelke, “The Development of External Mediation” in *Restructuring South Africa*, John Brewer, ed. (New York: St. Martin's Press, 1994), 132.

⁸¹ Horowitz, xii.

among groups demarcated by race, or about contending claims to the same land."⁸²

Horowitz describes these two conflicts as the conflict itself and the metaconflict (the conflict over the conflict). In Canada, a divided society in which the primary cleavage is language rather than race, there is also disagreement over the nature of the conflict. Whereas the conflict is generally described as being between French Canadians and English Canadians, it could more accurately be described as a battle over nationalism, economic sovereignty, cultural self-determination, resource rights and competing visions of Canada. To describe the Canada-Quebec question as being a debate over how best to preserve French-language rights while ensuring harmonious relations between the language groups would be a vast oversimplification. Thus, in terms of disagreement over the very nature of the conflict to be resolved, Canada is quite comparable to South Africa.

As deeply divided societies, both South Africa and Canada have experienced similar obstacles to the resolution of their conflicts. Pierre du Toit argues that "in severely divided societies, there is no 'community of consent about the basic structure of society' and 'the opposing parties do not share a common perceptual framework through which to assess societal conflict.'"⁸³ This is certainly the case for Canada, in which there is no agreement on whether the country should be viewed as a partnership between two nations (English Canada and French Canada), between three nations (English Canada, French Canada, Aboriginal Peoples) or between 11 governments (Federal and 10 provinces). Similarly, in South Africa there are a number of

⁸² Horowitz, 1.

⁸³ Pierre du Toit, "Contending Regime Models and the Contest for Hegemony in Divided Societies", 1989, p. 19, as cited in Horowitz, 33.

competing conceptions of the nature of the society. Horowitz details twelve different perspectives on how South Africa should be viewed.⁸⁴

The fact that South Africa is just as divided if not more deeply divided than Canada makes it an interesting case for comparison. Horowitz argues that, "if democracy endures in South Africa, more fortunately situated countries will have ground for greater optimism."⁸⁵ We would argue that these grounds for optimism should extend beyond democratic consolidation. The very fact that South Africa was able to enter into constitutional negotiations and emerge with a document that is supported by the major parties to the conflict is a feat that other divided societies should view as a source of optimism.

Another important similarity is the colonial history of both nations. Canada was formed as a result of the unification of British North American colonies in 1867. While most of the colonies were primarily English-speaking, one was not. The inclusion of Quebec as a former French colony gave Canada its unique status as a country born of two distinct nations. It is an aspect of Canada's identity that remains today.

South Africa was also a British colony and was also born of two European nations. The struggle of the Afrikaner people to protect their unique language and culture bears much resemblance to the struggle of French Canadians. Some observers have drawn parallels between the Afrikaners and the Quebecois – particularly in the desire of some members of both groups to form a separate nation. Where the dissimilarities arise is in the lack of a geographical base for the Afrikaaner people vs. a very definite concentration of French Canadians in one province and in the

⁸⁴Horowitz, 3.

⁸⁵Ibid, xiii.

traditional political domination of the Afrikaners. Although French Canadians have held a significant degree of political power in Canada, as demonstrated by the fact that several of Canada's Prime Ministers and senior Cabinet Ministers have hailed from Québec, French Canadians have not enjoyed the long and continued domination of national politics that Afrikaner politicians in South Africa have experienced.

Yet another similarity between the two countries is the oppression of its native and disadvantaged peoples. This oppression took different forms in Canada and South Africa, however both nations will deal with its consequences for generations. Sheer numerical differences – aboriginals make up only 3% of the Canadian population⁸⁶, whereas black Africans make up 76.7% of South Africa's population⁸⁷ – dictates that the paths of native peoples in Canada and South Africa will be different ones. There is little chance that Canada's native peoples will find themselves at the helm of the country as blacks have in South Africa. There are, however, marked similarities in the issues being faced by native peoples in both nations and the struggles that they have undergone to gain recognition of their rights.

This brings us to the question of: what are some of the important differences between our two cases?

In the case of South Africa, the degree of constitutional change being contemplated was much more dramatic than in the case of Canada. Whereas Canada's negotiations have dealt with a package of amendments to the existing Constitution Act, 1982, which was itself the result of amendments to Canada's first constitution – the British North America Act, 1867, South Africa's negotiations concerned an entirely new constitution that would radically alter the country's political and legal

⁸⁶ Statistics Canada, 1996 Census: Aboriginal Data. Press Release, January 13, 1998. Note – Aboriginal includes North American Indian, Métis and Inuit.

⁸⁷ Statistics South Africa. Census in Brief; Population Census, 1996. (Pretoria, 1998)

system.

To complicate matters further, South Africa's negotiation concerned not only a new constitution, but also a democratic transition. Although it is difficult to classify the apartheid regime, it was certainly not a democracy. Samuel Huntington convincingly argues that South Africa was a type of authoritarian state - “a *racial oligarchy* with more than 70 percent of the population excluded from politics but with fairly intense political competition occurring within the governing white community.”⁸⁸ The transition to a democratic regime that began with the 1994 elections will continue for several years. The fact that South Africa was simultaneously undertaking this transition and negotiating its new constitution added a complication which Canada has not had to face. Since Confederation Canada has been a Liberal Democracy and it is a virtual certainty that no negotiated settlement would change this.

Finally, South Africa's negotiation involved the transfer of power from a ruling white minority to the black majority. In Canada, there will not be a wholesale transfer of power between ethnic or linguistic groups. In the negotiations that have occurred to date there have been provisions to increase the rights and powers of French Canadians and Canada's aboriginal people, however the existing balance of power between ethnic and linguistic groups would remain unchanged.

We would argue that while we must remain cognizant of the significant differences that exist between our two cases, there are enough similarities to merit the use of comparative analysis. Both Canada and South Africa are deeply divided societies with a commitment to finding a constitutional solution for their conflicts. Both countries have similarities in their historical backgrounds. As we will see later

in this study both nations utilized negotiating structures that were similar in many respects. The differences in the circumstances surrounding the negotiations and the results that they yielded will be useful in raising some issues for discussion and some questions that merit further study.

⁸⁸ Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century (University of Oklahoma Press, 1993) p. 111. (my emphasis)

CHAPTER FIVE – COMPARATIVE ANALYSIS

Now that we have examined the theoretical framework and methodology for the study, as well as the salient points of historical background for both of our cases, it is time to turn to the negotiations themselves.

In this chapter, we will begin with a brief discussion of the constitutional negotiations in South Africa and Canada. We will then examine more closely some of the key factors accounting for the degree of success attained in each of the negotiations. For this latter exercise, our theoretical framework will be the social-psychological approach to negotiation and bargaining.

South Africa's Constitutional Negotiations

CODESA

At its inception in December 1991, the Convention for a Democratic South Africa (CODESA) was a source of great hope and optimism for those South Africans committed to a negotiated settlement. Unfortunately, CODESA would also lead to great disappointment as this round of negotiations floundered and came grinding to a halt in June 1992.⁸⁹

CODESA marked the beginning of serious discussions. At last the pre-negotiation manoeuvrings were over and the negotiating parties were ready to discuss the details that would lead to an agreement on the shape of a new South Africa. As Ralph Lawrence states, “leaders dotted along the ideological spectrum were now prepared to trade views.”⁹⁰

⁸⁹ Friedman, et al, 1993, 31.

⁹⁰ Lawrence, 9.

The chief parties in this round of negotiations were the ANC and the South African government, however other parties were invited to participate in the process. This led to complications that had not been faced during bilateral negotiations.

The convention was co-chaired by two judges, one black (Ismael Mohamed), one white (Piet Schabert). The participants in the plenary of the convention included representatives of 19 parties, including the ANC, the South African Communist Party, the Transvaal and Natal Indian Congresses, the National Party, the Inkatha Freedom Party, the Democratic Party, five parties which controlled "homeland" administrations, three parties from the national tricameral parliament and the four TBVC ("independent homeland") administrations. The South African Government sent a delegation that was distinct from the NP's delegation, however NP cabinet ministers dominated both delegations.⁹¹ The parties not participating in Codesa included parties of the far right (the Conservative Party, the AWB and the HNP) and the left (AZAPO).

Structure of Codesa

It was at the first session of Codesa (Codesa 1), that the procedural rule known as "sufficient consensus" was first introduced. Sufficient consensus was reached when enough organizations were in agreement to allow the process to proceed.⁹² Although there were some efforts to ensure that the views of smaller non-consenting organizations were taken into account, essentially sufficient consensus meant that if the ANC and the SAG agreed, the process would continue.⁹³ The Sufficient

⁹¹ Friedman et al, 1993, 23.

⁹² David Welsh, "Negotiating a Democratic Constitution" In *Change in South Africa*, 22-49. J. E. Spence, ed. (London: Pinter Publishers, 1994), 26.

⁹³ Lawrence, 10.

Consensus rule would remain in effect throughout Codesa and the Kempton Park negotiations.

Codesa 1 appointed five working groups to "prepare the way to a second plenary."⁹⁴ Much of the real bargaining at Codesa took place within these working groups. Within each working group, the parties participating in Codesa were each represented by two delegates and two advisors. The working groups covered the following areas:

- 1) creation of a free political climate
- 2) constitutional principles and a constitution-making body
- 3) transitional or interim government
- 4) reincorporation of the TBVC states
- 5) time frames for implementation of agreements

It should be noted that the subject areas that these working groups were organized to address were related more to the mechanics of the transition than to the issues that would be covered by the new constitution. One of the unfortunate consequences of this division of labour is that some working groups (WGs), such as WG1 were overwhelmed with the range of issues that they were expected to address, whereas others, such as WG5 had little to do.⁹⁵

The working groups were supplemented by a Gender Advisory Committee, a Daily Management Committee and a Secretariat. One participant of the Working Groups commented that the process within them was slow and "highly ritualized", with "no sharp focus on fundamental issues and little cut and thrust of debate on the position of a particular party."⁹⁶ Each participant was given a chance to present its position on every agenda item. From the standpoint of an ANC member, it appeared that an inordinate amount of time was spent on presentations by parties with very little

⁹⁴Friedman et al, 1993, 25.

⁹⁵Ibid, 32-33.

⁹⁶Frene Ginwala, "Into and Out of Codesa Negotiations: the View from the ANC", 20.

popular support.⁹⁷ Once the presentations had been made, a Steering Committee of the working group would produce a draft formulation as a basis for consensus, which would then be discussed.

Alliances

There was an effort on the part of the two main negotiating parties to forge alliances with smaller parties. In particular, the NP tried to counter its lack of popular support by forging "a stable anti-ANC coalition"⁹⁸ with conservative parties, homeland leaders and the IFP - anyone with an interest in avoiding majority rule by the ANC. Neither the ANC nor the NP was particularly successful in building coalitions, as "many of the smaller Codesa parties remained uncommitted, afraid of compromising their future by turning to the losing side."⁹⁹ As a result, no stable coalitions emerged during Codesa.

Although the purpose of Codesa was not to draft a constitution but to prepare the way for a constitutional convention, there were great expectations for the outcome of the conference.¹⁰⁰ Unfortunately, the end of Codesa brought little in the way of concrete agreements. Friedman argues that the reason for Codesa's deadlock "lay not in the convention's presumed flaws but in the reality that the parties were not yet ready to agree."¹⁰¹ Ottoway agrees that the parties were too far apart at Codesa to have come to an agreement. She contends that the conference was "built on the shaky foundations of conflicting goals, misunderstandings and lack of good faith."¹⁰²

⁹⁷Ginwala, 20.

⁹⁸Ottoway, 165-66.

⁹⁹Ibid, 164.

¹⁰⁰Friedman et al, 1993, 172.

¹⁰¹Ibid, 172.

¹⁰²Ottoway, 158.

Whatever reason for Codesa's collapse, the period immediately following was one of the most difficult periods that South Africa has known. As one commentator noted "all the fault lines in South African Society and Politics which had been papered over during Codesa became evident, revealing the potential for prolonged instability well into the future."¹⁰³ What had begun as a cordial relationship between Mandela and De Klerk soured during Codesa and by mid-1992 Mandela had broken off the negotiating relationship entirely. For three months their exchanges were limited to angry memoranda.¹⁰⁴

During this time, the only line of communications was between the chief negotiators for the ANC and the NP, Cyril Ramaphosa and Roelf Meyer, who became known simply as "the channel." This relationship has been credited with ensuring that the negotiations did not stagnate during the period when formal negotiations had ceased.

Formal negotiations resumed with the Record of Understanding, which included a concession by the South African Government (SAG) that the final constitution would be drafted by an elected constitution-making body and ANC's concession that the constitution-making body would be bound by a set of constitutional principles that would be agreed to by a multi-party negotiating process. The Record of Understanding also laid the groundwork for an interim government of national unity (GNU) and an interim constitution. The IFP was angered by the Record of Understanding, which it saw as an "implicit assumption of ANC/government hegemony."¹⁰⁵

¹⁰³Friedman et al., 1993, 177.

¹⁰⁴Welsh, 24.

¹⁰⁵Ibid, 26.

Although Codesa succeeded in allowing the major negotiating parties to "feel each other out", it wasn't until the 1993 negotiations that the bargaining became concerned with the details of the new political system.¹⁰⁶ Little had been settled at Codesa, however the precedents which were set at that bargaining venue carried over to the new round of negotiations and helped to keep the process moving along. The issues that had been on the agenda at Codesa were also carried over to the 1993 negotiations, although they were dealt with in greater detail at the latter.

The transition process agreed to in the 1992 Record of Understanding was a two-stage process. In the first phase, a non-elected, multi-party negotiating body would draft an interim constitution. This constitution would remain in place while a permanent constitution was negotiated by an elected constituent assembly. The constituent assembly would be constrained by a set of pre-determined constitutional principles.¹⁰⁷

The structure of the 1993 negotiations differed somewhat from Codesa. The highest decision-making body was the plenary, with ten delegates per party. The arena for debate was the negotiating council, which consisted of the chief negotiator and one advisor from each party. The planning committee of ten played a facilitation role and kept the process moving along. Finally, technical committees organized according to issue areas, much like working groups at Codesa, met to receive submissions from the parties and transform them into proposals.¹⁰⁸

The structure of the 1993 negotiations in South Africa was designed to counter criticism that Codesa had excluded smaller parties and the public. In particular, the

¹⁰⁶Friedman and Atkinson, 1994, xii.

¹⁰⁷Doreen Atkinson, "Principle Born of Pragmatism?" in *The Small Miracle*, Friedman and Atkinson, ed. (Ravan Press: Pretoria, 1994), 94.

¹⁰⁸Doreen Atkinson, "Brokering a Miracle" in *The Small Miracle*, Friedman and Atkinson, ed. (Ravan Press: Pretoria, 1994), 24.

negotiating council was meant to allow the public to view the debate. This masked the processes ongoing below the surface, such as the planning committee, which met privately and did not publish its minutes. According to Doreen Atkinson, the planning committee became the "'black box' where the process was steered, and crucial agreements reached."¹⁰⁹ Atkinson credits the "subcommittee" of the planning committee, consisting of representatives of the SAG, ANC and IFP with even greater influence.

Atkinson argues that the 1993 process was both more open than that of Codesa and also more closed. She offers as an example the use of *bosberaad* - private meetings between important negotiating partners in undisclosed, remote venues to resolve critical issues.¹¹⁰ Although the public was allowed to view some aspects of the negotiating process, the most important negotiations occurred behind closed doors.

Participation in the Multi-Party Negotiating Process was broader than Codesa. The Codesa parties were joined by the PAC, the Kwa-Zulu government, traditional leaders from the Transvaal, Orange Free State and the Cape, the Conservative Party and the right-wing Afrikaner Volksunie (AVU). "If the organizations present at Codesa represented over 80 per cent of the future electorate, those participating in the MPNP increased the figure to virtually 100 per cent."¹¹¹ Welsh points out that this broader inclusion made consensus more difficult to obtain.¹¹² The tendency was for the ANC and the NP to proceed once they were in agreement, since "sufficient consensus" had been attained, however some organizations were regular dissenters

¹⁰⁹Atkinson, 24.

¹¹⁰Ibid, 24.

¹¹¹Welsh, 26.

¹¹²Welsh, 26-27.

and claimed that they had been steamrolled during the negotiations.

In the end, the pressure of the coming elections caused the approval of the constitution by 22 organizations at Kempton Park and the adoption of the draft constitution by parliament to be rushed. As a result, the interim constitution has been called "a messy and inconclusive document, the result of inevitable compromises."¹¹³

Although the adoption of an interim constitution can be considered the most significant accomplishment in South Africa's "small miracle", the story does not end here. Once the interim constitution was adopted, the work of drafting a permanent document began. The analysis in this study will focus on the negotiations leading to the interim constitution, however to ensure the proper context we will briefly describe the structure of the negotiations leading to the permanent constitution.

As well as setting out provisions for the governance of South Africa during the interim period, the 1993 constitution listed 34 Constitutional Principles upon which the permanent constitution would be based.¹¹⁴ It further dictated that the new constitution would be negotiated by a Constitutional Assembly comprised of the 490 members of the National Assembly and Senate. The permanent constitution would be drafted and approved within two years. To avoid deadlock, the interim constitution was very specific about the ratification procedures that would be employed and the options that would be available if ratification was not immediately forthcoming.

Like the rounds of negotiations that preceded it, the Constitutional Assembly divided its members into sub-groups, called "theme committees". Each theme committee was comprised of 30 members, representing the parties proportionally.

¹¹³Welsh, 33.

¹¹⁴ Schedule 4, 1993 Interim Constitution of the Republic of South Africa.
www.constitution.org.za/1993cons.htm#SCHEDUL4

From among the committee membership, three chairpersons and a core group of 7 or 8 persons was selected to co-ordinate the work of the committee. According the 1996 annual report of the Constitutional Assembly “Theme Committees were tasked with receiving and processing the views of political parties and the broader community and compiling reports for discussion in the Constitutional Committee.”¹¹⁵ Each Theme Committee was assigned a technical committee of four advisors to give technical advice and assist in compiling reports.

Theme Committees covered the following areas:

- (1) Character of the Democratic State
- (2) Structure of Government
- (3) Relationship between Levels of Government
- (4) Fundamental Rights
- (5) Judiciary and Legal Systems
- (6) Specialised Structures of Government ¹¹⁶

The Constitutional Committee was composed of 44 members, representing political parties proportionally, and was mandated by the Constitutional Assembly with negotiating the constitutional text. The size of the committee became unwieldy, however, and a sub-committee of 20 members was appointed in June 1995. The sub-committee had no direct decision-making ability – it reported to the full Constitutional Committee. The smaller size and the ability of the members to meet frequently made the sub-committee a very effective body.¹¹⁷ A unique feature of the sub-committee is that it was comprised of some permanent members and some ad-hoc members who were invited when particular subjects were being discussed.

¹¹⁵ Annual Report, 1996. Constitutional Assembly. www.constitution.org.za/ca95_96.htm

¹¹⁶ Ibid.

¹¹⁷ Ibid.

Most of the negotiations took place in the Theme Committees and the Constitutional Committee (and sub-Committee). The plenary of the Constitutional Assembly met only 4-5 times per year.

Other structures that were part of the constitutional drafting and negotiation process included an Independent Panel of Constitutional Experts, the Commission on Provincial Government and the Volkstaat Council. The Independent Panel of Constitutional Experts was tasked with playing a role in conflict resolution to avoid deadlocks between parties. It also advised the Constitutional Assembly on matters dealing with the functions of the assembly.¹¹⁸ The Commission on Provincial Government was tasked with bringing about provincial governments as outlined in the interim constitution. The Volkstaat Council was established to enable proponents of a Volkstaat to pursue its establishment constitutionally. The Constitutional Assembly was successful in fleshing out the principles established in the interim constitution.

After almost two years of negotiations, South Africa's permanent Constitution was adopted by the Constitutional Assembly on May 8th, 1996. Although these final years spent negotiating the details of South Africa's constitution were undoubtedly difficult, these negotiations were greatly facilitated by the groundwork of earlier negotiations that led to the interim Constitution. As Nelson Mandela said in his speech on Adoption Day, "long before the gruelling sessions of the final moments, it had been agreed that once and for all, South Africa will have a democratic constitution based on that universal principle of democratic majority rule. Today, we formalise this consensus. As such, our nation takes the historic step beyond the transitory

¹¹⁸ Ibid.

arrangements which obliged its representatives, by dint of law, to work together across the racial and political divide.”¹¹⁹

Canada’s Constitutional Negotiations

In Chapter Four, we examined the path that Canada followed from the adoption of the British North America Act in 1867 to the repatriation of the Constitution in 1982. We will now turn to the structure of the negotiations that Canada’s political leaders pursued leading to the Meech Lake Accord in 1987 and the Charlottetown Accord in 1992, neither of which was successful in either resolving Canada’s conflict or in amending the constitution.

Meech Lake Accord

The Meech Lake Accord was aimed at addressing Quebec's exclusion from the 1982 agreement to amend and repatriate the constitution.¹²⁰ Whether it was wise of the federal government, led by Prime Minister Brian Mulroney, to attempt to resolve this issue rather than to let the Quebec problem fade away through "benign neglect" is a matter of debate among Canadian political scientists.¹²¹ What is generally agreed is that the failure of the Meech Lake Accord left the country more deeply divided than at any time in its history.

Kenneth McRoberts argues that it was the departure of Pierre Trudeau from the political scene in the spring of 1984 that opened the door to public consideration of the need to repair the damage caused by the 1982 repatriation of the Constitution

¹¹⁹ Nelson Mandela’s Address on the Adoption of the New Constitution, May 8, 1996.
www.constitution.org.za/sp0508.htm

¹²⁰Stein, 43.

¹²¹Russell, 1993(1), 127-128.

without Quebec's consent.¹²² Another significant event was the defeat of the Parti Québécois government by Liberal leader Robert Bourassa,¹²³ which gave the rest of Canada cause to believe that Quebec might be willing to negotiate. In May 1986, Quebec's Minister of Intergovernmental Affairs, Gil Remillard, presented to a small group of academics, government officials, journalists and business representatives gathered at a ski resort north of Montreal,¹²⁴ five conditions under which Canada's constitution would be acceptable to Quebec:

1. A veto over constitutional change affecting Quebec;
2. Recognition of Quebec's status as a distinct society;
3. Limitation of the federal spending power;
4. Participation in Supreme Court nominations; and,
5. Recognition of Quebec's existing powers in immigration.¹²⁵

These conditions were viewed as the most reasonable proposals for constitutional change to have come out of any Quebec government in decades and they signalled Quebec's willingness to return to the bargaining table.¹²⁶ Rather than put the proposals out for public consultation, a decision was made to develop them through quiet diplomacy. Peter Russell views this closed and elitist approach as a sign of how out of step the constitutional aficionados were with the general public and he argues that this approach contributed to the negative response that eventually came from the rest of Canada.¹²⁷ The exercise was to shape Quebec's demands into constitutional proposals that could be supported by all the provinces. Russell calls it "a classic exercise in elite accommodation."¹²⁸

¹²² McRoberts, 1997, 190.

¹²³ Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, Constitutional Chronology, 1926-1987.
www.solon.org/Constitutions/Canada/English/Committees/Meech_Lake.../mlr-ch1.htm

¹²⁴ Russell, 1993(1) 133.

¹²⁵ McRoberts, 1997, 191.

¹²⁶ Ibid.

¹²⁷ Russell, 1993(1), 134.

¹²⁸ Ibid, 135.

The groundwork for the Accord was laid through tours of provincial capitals during the summer of 1986 by both Quebec officials and federal officials, focussed on the five-point proposal.¹²⁹ The final negotiations took place at the end of April 1987 at the government's conference centre on Meech Lake, just outside of Ottawa. This final meeting was between the 10 Premiers and the Prime Minister only. Other provincial ministers and advisors were not permitted to participate in the negotiations. The provinces were allowed only a single notetaker among them. The theory behind these restrictions was that the limitation of direct participation to the first-minister level would maximize the instinct for compromise and the chances of achieving an agreement.¹³⁰ Most major federal-provincial decisions in Canada were reached through a form of elite accommodations known as executive federalism, however it was unusual to limit negotiations to include only first ministers and to not allow any advisors to participate.

Although the first ministers emerged from the meeting at Meech Lake victorious, the Accord would not achieve ratification. One of the fatal flaws of the Accord was that it did not specify a timetable for ratification. The default timetable was one specified in the constitution - once a resolution to ratify a constitutional amendment is passed by one provincial legislature, the other provinces have a maximum of three years to adopt similar ratifying resolutions. As Richard Simeon points out, this three year process "made it virtually inevitable that a number of elections would have been held and thus that governments not part of the initial

¹²⁹ McRoberts, 1997, 192.

¹³⁰ Patrick Monahan, "The Sounds of Silence" in The Charlottetown Accord, the Referendum and the Future of Canada. Kenneth McRoberts and Patrick Monahan, eds. (University of Toronto Press: Toronto, 1993), 229.

bargaining, and not committed to its success, would have been elected."¹³¹ That is precisely what occurred.

Within a year of the first ministers agreeing to the Meech Lake Accord, it had been ratified by a strong majority in the federal parliament (242-16) and positive votes in 8 of 10 provincial legislatures.¹³² It initially enjoyed a 56% approval rate in public opinion polls.¹³³ This initial level of support begs the question of what caused the accord to not achieve ratification within three years.

Opposition to Meech was initially based outside of Quebec. English Canadians resented the concept of a round of constitutional change that was devoted to Quebec's constitutional demands and ignored the constitutional changes favoured in other parts of the country.¹³⁴ The Accord was also attacked by special interest groups, who had been included in Parliamentary hearings on the subject of constitutional change in 1982 and felt excluded by the closed negotiations at Meech Lake.¹³⁵ Cairns argues that the first ministers did not understand the fact that the introduction of the Charter of Rights in 1982 had transformed what had been a government's constitution into a citizen's constitution.¹³⁶ Russell argues that the negotiators did not anticipate the difficulty of combining the traditional practice of executive federalism with the new requirement of legislative ratification as set out in the 1982 amending formula.¹³⁷

¹³¹Richard Simeon as cited in Russell, 1993(1), 141.

¹³²Christopher Manfredi, "Politics of Constitutional Modification", *Law and Society Review*, Vol 31, No. 1, 1997, 123.

¹³³*Ibid*, 123.

¹³⁴Russell, 1993(1) 142.

¹³⁵Stephen Brooks, "Consent and Constitutional Change in Canada." *Journal of Commonwealth & Comparative Politics*, Vol 32, No. 3, November 1994, 293.

¹³⁶Alan Cairns. "Citizens, Scholars and the Canadian Constitution." *International Journal of Canadian Studies*, Vol. 12, Fall 1995. 285-289.

¹³⁷Russell, 1993(2), 35.

All of this public discontent translated into pressure on the provinces that had not yet ratified the Meech Lake Accord. By the end of 1988, only two provinces - New Brunswick and Manitoba - had not ratified the Accord. In both of these provinces, elections held after 1987 replaced the governments that had signed the Accord with new governing parties. Another province in which a pro-Meech government was replaced by an administration that opposed the Accord was Newfoundland. All three of these provinces would present threats to the ratification process in the years leading up to the deadline.

By the time the allotted period for ratification had run out in the Spring of 1990, the Meech Lake Accord was strongly opposed by a majority of Canadians outside Quebec yet had been ratified by all but two provincial legislatures.¹³⁸ This discord between popular opinion and the support of provincial legislatures foreshadowed of the difficulties that would be faced when the Charlottetown Accord was put to a referendum 2 years later. No public hearings on the Meech Lake Accord were held in Saskatchewan, Alberta, Nova Scotia, British Columbia, Newfoundland and Quebec.

The failure of the Meech Lake Accord has been blamed on both substance and process. The lack of public involvement, the indivisibility of the package of amendments, the constraints of unanimity and the three-year time limit were all aspects of the process that were criticized. The substance of the Accord was felt by many to be too narrowly focussed on Quebec's demands. Outside of Quebec there was a desire to be comprehensive and inclusive in constitutional negotiations.¹³⁹

¹³⁸Russell, 1993(1), 215.

¹³⁹ Hurley, 10.

Charlottetown Accord

After the failure of the Meech Lake Accord, Prime Minister Mulroney committed himself to a more inclusive process for the next round of negotiations. In response to public feeling that the Meech Lake Accord had been focussed too narrowly on meeting the concerns of Quebec, this next round of negotiations was deemed the "Canada Round". The intent was to consult widely and negotiate a deal that would accommodate the aspirations of all Canadians - a daunting task.

The Canada Round began with the establishment of the Spicer Commission in November 1990. The Citizens Forum on Canada's Future, chaired by Keith Spicer, was mandated with consulting broadly with Canadians and communicating their concerns. The commission consulted with over 600,000 Canadians and issued its report in June 1991. The main conclusion of the Spicer Commission was that Canadians were disenchanted with elected politicians. The focus was on calling for new processes rather than the substance of Canada's constitutional development.¹⁴⁰

A second committee, the Beaudoin-Dobbie Committee, was established in September 1991 to consult with the public on the government's first set of draft constitutional proposals. The committee ran into difficulties due to public scepticism and indifference, however its credibility was salvaged when the government announced five constitutional conferences on various elements of the federal proposals.¹⁴¹ The conferences involved "ordinary Canadians", interest groups and politicians. The Beaudoin-Dobbie Committee submitted its report on February 28th, 1992, and so ended the public consultation phase of the Canada Round.

The next phase of consultations was similar to the executive federalism model that Canada has traditionally employed in constitutional negotiations. Patrick

¹⁴⁰ Hurley, 15.

Monahan argues that this reversion to "elite accommodation" in the final stages of the Canada Round was a virtual necessity given Canada's current amending formula.¹⁴² Since the provinces must agree to any constitutional change, provincial government support for any proposed constitutional package is a necessity. Monahan argues that the only way to ensure provincial "buy in" is to ensure that governments are the key players in the final stages of the process.

The final stage of the Canada Round was known as the multilateral negotiations. In contrast to Meech Lake, the provincial delegations at these meetings included ministers and their advisers and the entire process was chaired not by the Prime Minister, but by Constitutional Affairs Minister Joe Clark. The meetings were held between the 12 of March and the 7th of July, 1992.

During the final stage of the Canada Round, the heads of the provincial, federal and aboriginal delegations formed a committee known as the Multilateral Meeting on the Constitution (MMC). The MMC created four working groups, on the following issue areas: unity and diversity; central institutions; aboriginal matters; roles and responsibilities. These working groups were composed of officials from the various delegations, who would outline options and make recommendations to the Co-ordinating Committee on the Constitution (CCC), which was composed of senior officials. The CCC would then present options to the MMC (ministers and heads of delegations), who would either take a decision or refer the matter back to the officials for further work. The First Ministers Meeting on the Constitution (provincial Premiers and the Prime Minister), from the 4th to the 28th of August was the forum for final decisions.

¹⁴¹Monahan, 225.

¹⁴²Ibid, 226.

This process afforded officials a much greater role in the process than they had during the Meech Lake meetings. The involvement of officials had been avoided during Meech due to the fear that they would "render the process cumbersome, bureaucratic and inefficient" and that they would be more inflexible than their elected counterparts.¹⁴³ In the case of the Canada Round negotiations, the inclusion of officials did complicate the process and make it more time consuming, however the process yielded unanimous agreement in the end.

Monahan attributes the success of the multilateral negotiations to three factors. First of all, he argues that the role played by the federal government in this round was as a facilitator rather than a negotiating party with a coherent strategy and bottom-line objectives.¹⁴⁴ It appeared that the primary objective of the federal delegation was to achieve a settlement. Despite the flexibility demonstrated by the federal government, it should be remembered that it was an interested party rather than a neutral facilitator.

A second success factor identified by Monahan is the absence of Quebec from the early stages of the negotiation process. The absence of Quebec both narrowed the differences around the table and ensured that on two controversial issues (Senate reform and Aboriginal self-government), the provinces who found themselves in the minority did not receive support for their positions from Quebec, and thus consensus was more easily achieved.

Finally, Monahan argues that "the widespread belief among all the governments around the table that the costs of failure were very high"¹⁴⁵ was instrumental in bringing about a successful conclusion to the negotiations.

¹⁴³Monahan, 228.

¹⁴⁴Ibid, 231.

¹⁴⁵Ibid, 236.

Unfortunately, this belief in the high cost of failure was not shared by the Canadian public. The Charlottetown Accord was put to a referendum on October 26, 1992 and was rejected by a majority of Canadians. This study will argue that differing perceptions of the cost of failure is one of the primary reasons that Canada's negotiations have failed to achieve ratification whereas South Africa's negotiations were successful.

APPLICATION OF THEORETICAL FRAMEWORK

The complexity of negotiations in general and constitutional negotiations in particular dictates the need for a conceptual framework through which to view the negotiations, particularly for the purposes of comparison. The Social-Psychological approach provides a useful classification of the "variables that may affect the course and character, of bargaining and negotiation at the interpersonal, intergroup and international levels."¹⁴⁶

Dependent Variables

Before we begin to look at the factors that affected the effectiveness of the negotiations in our two cases, we must establish what we mean by effectiveness. Rubin and Brown see criteria of bargaining effectiveness as the dependent variables in experiments or studies build around bargaining. The authors concede that it is difficult to determine bargaining effectiveness, since "bargaining frequently involves intangible issues as well as tangible ones...and because agreements often have long-term or future consequences."¹⁴⁷

¹⁴⁶ Bercovitch, 129.

¹⁴⁷ Rubin and Brown, 33.

Indeed, both of these constraints exist for our cases. The negotiations involve many intangible issues for which it is difficult to gage success. The long-term consequences, paired with the relatively short period of time which has elapsed since the conclusion of South Africa's constitutional negotiation and the collapse of Canada's latest round, make it difficult to truly gage success or failure. Although we may assume South Africa's negotiation to have been the more successful, if the new constitution loses legitimacy in the coming years and results in the widespread civil unrest and violence that the negotiated settlement was intended to avoid, would we still consider the negotiations to have been a success?

Similarly, Canada may continue to exist peacefully under its current, unmodified constitution for several decades. In such a case, the long-term consequences of the failure of the Meech Lake and Charlottetown Accords may be found to be neutral.

In an attempt to identify specific dependent variables for bargaining and negotiation, Rubin and Brown looked at those most commonly used in experiments on this topic. He found that the two most frequently selected measures of effectiveness have been "1) the number of co-operative or competitive choices made throughout the total number of trials and 2) the magnitude of the outcomes obtained by the bargainers."¹⁴⁸

There are several difficulties in using either of these dependent variables for our study. First of all, the calculation of the number of co-operative or competitive choices made is exceedingly difficult in a complex negotiation such as those that we are studying – particularly when the available data is third-party and historical. Secondly, the results of a series of choices may not reflect the overall result of the

¹⁴⁸ Rubin and Brown, 34.

negotiation. Finally, these variables seem to focus on the relative success or failure of the parties to the negotiation rather than the success of the negotiation as a whole.

The challenge of defining success in negotiation is indeed formidable. However, we will attempt to set some parameters for the purposes of our study. Firstly, we will focus on the success of the negotiation as a whole rather than on the relative success or failure of any of the parties to the negotiation. Secondly, we will look at the immediate consequences of the negotiation, setting aside the long-term ramifications.

For this study, successful constitutional negotiation will be defined as one that produces a constitutional amendment or a new constitution which addresses the major sources of conflict. Since for our purposes it is not possible to determine the long-term durability of the negotiated settlements being discussed, a constitutional settlement which is ratified and proclaimed will be deemed successful.

It is important to note here that the Social-Psychological approach focuses on the negotiation itself and not on the ratification of the results of the negotiation by external parties. This is significant because in the Canadian case, the negotiations which took place leading to the Meech Lake and Charlottetown Accords could be considered successful in that they achieved agreements which were acceptable to all parties to the negotiation, however both accords failed to receive ratification by legislatures (in the case of Meech Lake) or the electorate (in the case of Charlottetown). Thus, for the purposes of this study, we must expand our definition of success beyond the actual negotiation to include ratification by external parties.

Independent Variables

As was outlined in Chapter 2 (Theoretical Framework), Rubin and Brown have identified a number of independent variables as factors affecting bargaining effectiveness. In doing so, they concede that there is an inherent danger in using this kind of “organizational scheme” to investigate something as complex as a negotiation “even as it systematically sharpens the clarity of certain issues, it removes or obscures others from the investigator’s (and the reader’s) view.”¹⁴⁹ While recognizing the danger of obscuring some issues, the authors see the use of an organizational structure as a necessity. We view the use of the social-psychological framework in the same light. While we must be aware of its limitations, it allows us to organize issues occurring within two otherwise unwieldy cases.

In Chapter 2, we identified the four underlying dimensions within which Rubin and Brown organize their independent variables: a) the structural context; b) the behavioural predispositions of the parties; c) the nature and underlying characteristics of the bargainers’ interdependence; and d) the use of social influence and influence strategies.¹⁵⁰ We will now use each of these dimensions to analyze our two cases.

Structural Factors

Structural factors relate to the physical and social characteristics of the negotiation. Bercovitch describes these as situational factors and divides them into sub-categories, including physical components (eg. site of bargaining), social

¹⁴⁹Rubin and Brown, 34.

¹⁵⁰ Ibid, 36.

components (eg. number of parties involved, presence of third parties), issue components (eg. tangible or intangible conflict issues, number of issues) and components relating to interpersonal orientation (eg. communication channels, openness or secrecy of the process).¹⁵¹

According to the accounts of observers, the physical components of the negotiations played only a minor role in our two cases. Nonetheless, the symbolism of the negotiating sites was taken into consideration by organizers.

In South Africa, the Codesa negotiations took place at the World Trade Center outside of the Johannesburg Jan Smuts Airport, a site which was chosen for its lack of symbolism. It was felt that these historic negotiations should take place in a venue "with little association to the past."¹⁵² When the negotiations resumed after the collapse of Codesa, they were once again held at the World Trade Center.

During the post-Codesa negotiations, the two main negotiating parties would periodically make use of *bosberaad*, private meetings at remote venues, to discuss critical issues. Game parks were favoured because they were relatively inaccessible to outsiders and the casual atmosphere was congenial.¹⁵³

In Canada, both accords that were reached in the late 80's and early 90's bore the names of the places where they were conceived. The Meech Lake Accord was negotiated at a government conference centre in the Gatineau Hills near Ottawa. The selection of Charlottetown, where the agreement on Confederation had been signed over a century earlier, for the conclusion of the "Canada Round" negotiations was no mistake. It was meant to evoke Canada's roots and its history as a nation. What is ironic is that while the "Canada Round" emphasized public participation and citizen

¹⁵¹Bercovitch, 131.

¹⁵²Friedman et al, 1993, 21.

¹⁵³Atkinson, 24.

engagement, the Confederation agreement, leading to the British North America Act of 1867, was no great feat of democracy. As we discussed in Chapter Four, Canada's constitution was the product of a process that had more in common with the process leading to the Meech Lake Accord than that leading to the Charlottetown Accord.

In terms of physical components, we would conclude that the locations of the negotiations, although carefully thought out for symbolic and public relations purposes, had relatively little bearing on the outcomes of the cases that we are examining. It is interesting to note, however, that in the South African context the physical removal of negotiators to remote locations for the resolution of critical issues was found to be useful. This was possible due to the small number of main negotiating parties. In Canada, the larger number of parties whose consent is required for any settlement complicates matters considerably, as will be discussed below. It is difficult to imagine ten provinces and the federal government sneaking away for a secluded *bosberaad* to resolve nagging areas of disagreement.

Another important subset of situational factors involves social components, such as the number of parties in the process and the presence of third parties. The absolute number of parties in the negotiating processes under consideration is relatively similar. During Meech Lake, 11 parties were represented - including the federal government and the 10 provinces. During the Charlottetown Accord negotiations, the 11 governments were joined by representatives of the two territorial governments (the Northwest Territories and the Yukon) and representatives of four national aboriginal organizations.¹⁵⁴

The main variation between these two negotiations is the size of the negotiating parties. At Meech Lake, only the first ministers (Premiers and the federal

Prime Minister) were allowed at the negotiations. During the Charlottetown Accord negotiations, senior ministers and advisors were included, thus greatly increasing the size of the delegations.

In South Africa, 19 delegations were included at Codesa. The Kempton Park negotiations were more inclusive, with each of the Codesa parties being allowed to invite another party.¹⁵⁵ Although the absolute number of negotiating parties at South Africa's negotiations was greater, the number of parties whose consent was considered critical to a settlement was far smaller. As Friedman argues,

"the negotiations were in essence a pact between the two major parties, the African National Congress and the National Party. Others - most notably the Inkatha Freedom Party and its allies - certainly played some role in shaping the outcome, but it was a secondary one: it influenced the details but not the substance of our current political order."¹⁵⁶

Due to Canada's amending formula, the unanimous agreement of the negotiating parties was a requirement. This meant that all 11 of the negotiating parties were integral forces in the negotiations. The relative power of the negotiating parties in both Canada and South Africa will be discussed in more detail below during our consideration of *interdependence factors*.

The presence of third parties is another facet of structural components to negotiation and bargaining. In both of our cases, third parties were not present as formal mediators. Due to the pervasive nature of the conflicts in both nations, virtually the only possibility for neutral third-party intervention would be by foreigners. Any South African or Canadian presiding over the negotiations would invariably be associated with, and accused of favouring, one of the parties.

¹⁵⁴ Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in The Charlottetown Accord, the Referendum and the Future of Canada, McRoberts and Monahan, eds. (University of Toronto Press, 1993), 117-118.

¹⁵⁵ Atkinson, 25.

¹⁵⁶ Friedman et al, 1993, xii

In South Africa, the possibility of third party intervention was discussed, and even demanded by some parties. In fact, third party intervention had been attempted in the past as a means of halting apartheid, but had been unsuccessful. The failure of the Eminent Persons Group, for example, provided convincing evidence that South Africa's conflict could not be resolved without a full commitment by the parties to that conflict.

Once the movement towards a democratic regime had begun, the South African Government insisted that foreign intervention was not necessary, with the ANC and the Pan-Africanist Congress (PAC) insisting that it was.¹⁵⁷ The PAC insisted that negotiations leading to a constituent assembly, which would write the constitution, would have to occur under a foreign chair and at a foreign venue.¹⁵⁸ The PAC eventually retreated from this demand.

International mediation did enter into the South African negotiations, but not until the final days. A team of mediators was established to decide whether the 1993 constitution as negotiated was sufficiently federal to fulfil the terms of the negotiated settlement. Landsberg argues that this could more appropriately be termed arbitration rather than mediation.¹⁵⁹ In the end, this team was not used to arbitrate the constitutional disputes, as the team withdrew upon determining that a favourable outcome was unlikely.

In Canada, third party mediation has not been considered as a serious option. Some have argued that the federal government has, at various points in Canada's constitutional negotiations, attempted to act as a facilitator. In the Canada Round, for example, "the federal government at many points appeared to lack any coherent

¹⁵⁷Landsberg, 283.

¹⁵⁸Atkinson, 18-19.

¹⁵⁹ Landsberg, 292.

strategy or any sense of 'bottom-line' objectives. The main role it played was to act as a facilitator for the other parties around the table."¹⁶⁰ Nonetheless, the federal government can not be considered to be a disinterested third party playing the role of mediator. Whatever the results of future rounds, the federal government will certainly be a full party to the negotiations.

Another component of structural factors deals with the types and number of issues that are under negotiation. As has been mentioned previously, both the South African and Canadian negotiations have been wide-ranging and have dealt primarily with intangible conflict issues. These two characteristics make for exceptionally difficult negotiations, as there is much on the table and it is difficult to simply divide things up equitably.

In our comparison of both nations, it is difficult to argue which nation was dealing with more issues or which negotiation dealt with more intangible issues. The fact is that both Canada and South Africa have contemplated their very existence as nations. The constitutional negotiations in each nation have dealt with the definition of the society, the governing institutions, the division of powers between orders of government, the rights and freedoms of the citizenry and the responsibilities of the state.

One could argue that Canada's negotiations, since they have dealt with amendments to an existing constitution rather than the building of a constitution from the ground up, should have been easier than South Africa's negotiations. However, we would argue that the depth and breadth of the issues covered during Canada's negotiations have been such that the complexity of the negotiations rival any constitution-building exercise.

¹⁶⁰ Monahan,, 231.

Thus, in terms of the number and tangibility of the issues under discussion, we would further argue that Canada and South Africa have both tackled a broad range of intangible issues and no conclusions can be drawn from the comparison of the two nations on the basis of issue components.

The final component of structural factors that we will examine relates to interpersonal orientation such as the nature of communication channels, the openness of the process and the tensions experienced by the parties.¹⁶¹ We would argue that it is in these factors that we can begin to find the answer to the question of this study: why did South Africa succeed in negotiating a new Constitution, whereas Canada has been unable to amend its Constitution despite repeated attempts? Both of the cases have involved negotiations taking place in highly charged environments and this must certainly have had an impact on the negotiators.

One of the structural factors which contributed significantly to South Africa's success was the influence of the international community. We are discussing this apart from the sections on the role of third parties because the international community acted not so much as a third party mediator (although this was desired by some of the parties to the South African negotiation), but rather as a source of pressure on the South African negotiators. The existence of violence in the South African conflict and the fact that one of the parties to the conflict has been oppressed by the other throughout most of the nation's history gave the international community compelling reasons to intervene.

In the case of Canada, these reasons for intervention do not exist and it is unlikely that the international community will interfere in the affairs of the country. That being said, signals from influential members of the international community on

¹⁶¹Bercovitch, 131.

if and how a sovereign Quebec would be recognized could impact on the national unity debate. Another aspect of the international community's role is that which has been played by the financial community in warning Canada that as long as the national unity question lingers it will have negative repercussions for Canada's economy.

As was discussed in Chapter Four, pressure by the international community was an important factor in getting the parties to the negotiating table. This pressure and influence continued to play a role throughout the negotiations. Chris Landsberg argues that foreign intervention helped to create the preconditions for negotiation, became less influential during the initial stages of the negotiating process and then played an increased role when the process encountered difficulties.¹⁶² Landsberg further argues that “despite protestations to the contrary, foreign influence over negotiations was not restricted to attempts to ensure its success, regardless of the substantive outcome: attempts to shape the nature of the settlement were also evident.”¹⁶³ He argues that the U.S. as well as other western nations nudged South Africa towards federalism both through “helpful advice” and “conscious direction”.¹⁶⁴

The amount of influence that international actors were able to wield during South Africa's negotiations is arguable. However, many commentators agree that the attention of the international community added to the sense of urgency.

Summary of Findings – Structural Factors

To summarize, we found that physical components played little role in either negotiation, however the removal of key negotiators to remote locations for the resolution of critical issues was found to be useful in the South African context. In

¹⁶² Landsberg, 284.

¹⁶³ Ibid., 287.

¹⁶⁴ Ibid., 288.

terms of number of negotiating parties, we found that although South Africa's negotiations included a greater number of parties, there were fewer parties whose consent was considered critical to consensus (ANC and NP) than in the case of Canada, where the agreement of all ten provincial governments and the federal government were needed for consensus on major points. We would argue that the presence of fewer critical negotiating parties is one of the factors in South Africa's success.

There was no direct involvement of third parties in either negotiation, except for a few failed attempts at international mediation in South Africa. In terms of number of issues, we found that both parties were dealing with a comparable number of complex issues. Finally, we found that the pressure brought to bear on South Africa's negotiators by the scrutiny of the international community added to the sense of urgency and aided in the achievement of a negotiated settlement.

Behavioural Dispositions

The behavioural dispositions of the bargainers are another dimension of negotiations. Rubin and Brown argue that "there is little doubt that personality variables, as well as other individual characteristics, are important determinants of bargaining behaviour."¹⁶⁵ Bercovitch refers to these as personal factors, which include "all the individual characteristics, needs, attitudes, expectations and other enduring dispositions which the actors bring with them."¹⁶⁶ Although scientific analysis of the personal characteristics of the main actors in the South African and Canadian constitutional negotiations is lacking, many pundits have suggested that in

¹⁶⁵ Rubin and Brown, 37.

¹⁶⁶ Bercovitch, 130.

both cases the personalities of the negotiators have had an impact on outcomes.

It is worth noting that although the social-psychological approach focuses on the impact of personalities on the negotiation itself, the impact on public perceptions of the negotiation can not be discounted. In both the South African and Canadian cases the personalities of individual members of the negotiating parties had an impact on both the negotiations themselves and on how the public perceived the negotiations. Due to the importance of public perceptions of the negotiations in both cases, we will consider this aspect of personal factors in this study.

J. E. Spence contends that "the elusive factor of personality needs to be taken into account" when studying the South African negotiations.¹⁶⁷ He argues that although a number of factors influenced the emergence and ultimate success of the new breed of leader that F.W. de Klerk would prove to be, the personality of de Klerk can not be discounted. Spence states that it was de Klerk's right wing leanings left him unencumbered by the ideological baggage that might have restricted another leader and allowed him to understand what needed to be done in difficult circumstances. A less pragmatic individual might have been more persistent in holding on to the last vestiges of apartheid.

The personality of Nelson Mandela has also been hailed as one of the primary reasons that South Africa did not erupt into full-scale civil war. Apart from his role as the charismatic leader of his people and his party, Mandela has been credited with convincing white South Africans that they would have a place within an ANC-led South Africa. As one author observed, "peace was made because Mandela was able

¹⁶⁷ Spence, p. 5.

to persuade Afrikaners that he had the best interests of the nation – their nation, his nation, the South African nation at heart. They learned to trust him with their fate.”¹⁶⁸

David Welsh credits Mandela and De Klerk with "ensuring that whatever vicissitudes the negotiating process suffered it would not be permanently derailed."¹⁶⁹ He argues that these two men had a constructive, cordial relationship in the beginning and that they understood the grim alternatives for South Africa should a settlement not be reached. The relationship would later break down, however, and it is the efforts of two other men who would keep the negotiations moving along.

Roelf Meyer, Minister of Constitutional Development and Cyril Ramaphosa, Secretary-General of the ANC, were the chief negotiators for their respective organizations. These two individuals acted as an important conduit for the two main negotiating parties between the collapse of Codesa in 1992 and the resumption of negotiations in 1993.¹⁷⁰ In those politically heated times, it was not possible for Mandela and De Klerk to engage in official communications, however they were able to keep the lines of communications open through Meyer and Ramaphosa, who became known collectively as "the channel." Throughout the negotiations, the cordial relationship between the two chief negotiators, built on mutual trust and respect, played an important role in facilitating the process.¹⁷¹

In Canada, the debate on the influence of personalities has centred around the issue of Prime Minister Brian Mulroney's unpopularity with the electorate. Mulroney was Prime Minister during the negotiation of both the Meech Lake and the Charlottetown Accords. One of the findings of the Spicer Commission, which

¹⁶⁸ Patti Waldmeir, Anatomy of a Miracle: the End of Apartheid and the Birth of the New South Africa (New York: WW. Norton and Company, 1997., 92.

¹⁶⁹ Welsh, 23-24

¹⁷⁰ Welsh, 24.

¹⁷¹ Ibid.

travelled throughout Canada to consult with the public and ensure that their concerns were reflected in any future constitutional proposals, was that many Canadians had negative attitudes towards Prime Minister Mulroney. In polling done after the defeat of the Charlottetown Accord, 10% of respondents indicated that they voted "No" out of opposition to Brian Mulroney.¹⁷² Nonetheless, the dissatisfaction with politicians certainly extended beyond one individual politician and it would be difficult to make the case that the defeat of the Accord was due to dissatisfaction with the Prime Minister. It is doubtful that any individual as Prime Minister, given the same set of circumstances, could have brokered a significantly different package of amendments or convinced the Canadian public to accept them.

Another influential personality in the 1992 Referendum campaign is former Prime Minister Pierre Trudeau. Trudeau, who was a charismatic figure during his 15 years as Prime Minister,¹⁷³ and who presided over the 1982 repatriation of the Constitution, made a dramatic intervention during the Referendum campaign that many credit with collapsing the "Yes" vote outside of Quebec. Pierre Trudeau, a Quebecer, is seen by many in his province as a traitor for his role in repatriating the constitution without Quebec's consent and for his insistence on a model of federalism that gives equal status to all of the provinces. He is, however, widely respected outside of Canada and is seen as "a credible interpreter of Quebec politics to voters outside that province."¹⁷⁴ Trudeau first voiced his opposition to the Charlottetown Accord on October 1st. Over the next two days, the "Yes" vote collapsed in the opinion polls.

¹⁷²"Why Canadians Voted the Way They Did" (Maclean's/Decima Poll), Maclean's, 2 Nov. 1992, 17. As cited in Monahan, "The Sounds of Silence", 238.

¹⁷³ Canadian Parliamentary Library, Canadian Prime Ministers Since 1867, www.parl.gc.ca/36/refmat/library/pm-e.htm

¹⁷⁴Johnston, Richard. "An Inverted Logroll: The Charlottetown Accord and the Referendum." P.S. Political Science & Politics, March 1993. 47.

Peter Russell has described mega-constitutional politics, such as that in which both Canada and South Africa have been engaged, as "exceptionally emotional and intense."¹⁷⁵ In this atmosphere, it is not surprising that the personalities of particular individuals can make a difference, both at the negotiating table and in the battle for public support. What is difficult to gauge is the importance of personalities relative to other factors in the negotiating process. It is also difficult to know whether the actions of individuals are influenced primarily by the situations in which they find themselves or by inherent personal characteristics.

Two other aspects of individual characteristics about which Rubin and Brown have drawn conclusions are race and nationality. The authors found that "subjects tend to bargain more co-operatively with an opponent of the same race than with one of another race."¹⁷⁶ In terms of nationality, Rubin and Brown found that there were too few studies upon which to base a general conclusion, however they cited a study which found that in a study involving French Canadians and English Canadians, "weakness in another of shared cultural background acts to minimize exploitative behaviour. The same weakness in another of from a different, and presumably disliked, background, seems to invite exploitation."¹⁷⁷

In the case of South Africa, the fact that the two main negotiating parties were of different races in a society that has largely been defined by race, would certainly have added to the difficulty in achieving co-operative behaviour. As we will see in our examination of interactional factors and social influence strategies, however, the confrontational behaviour initially displayed by the negotiating parties faded into co-operative behaviour later in the negotiations. We would suggest that race is a strong

¹⁷⁵Russell, 1993(2), 33.

¹⁷⁶ Rubin and Brown, 163.

¹⁷⁷ Swindle, 1970, as cited in Rubin and Brown, 165.

factor in inhibiting co-operative behaviour before the negotiating parties become acquainted, however as the parties begin to relate as individuals rather than as members of an opposing race, race becomes less of a factor.

In the Canadian case, it is difficult to determine the influence of the fact that French Canadians and English Canadians were involved in the negotiation, because once the negotiations began they were not on strictly opposing sides. As we will see when we discuss interactional factors, French Canadians were often allied with English Canadians on various issues. The presence of aboriginal Canadians during the Charlottetown Accord adds another nationality group. We would argue that while nationality may have played a significant role in how members of the public perceived the conflict and the proposed settlement, it was not a determining factor among the negotiators themselves.

Summary of Findings – Behavioural Dispositions

To summarize, we found that in the South African case, many observers have pointed to the role of leaders such as Nelson Mandela and F.W. de Klerk as well as negotiators such as Cyril Ramaphosa and Roelf Meyer as key determinants of the success of the negotiated settlement. It is arguable whether individuals with different behavioural dispositions facing similar circumstances would have achieved similar results. It is important to note that beyond the negotiation itself, the behavioural dispositions of these individuals played a significant part in maintaining public confidence in the process.

In the case of the Canadian negotiations, more has been written on the role of personalities in the court of public opinion than in the negotiations themselves. A former Canadian provincial premier observes that few observers understand the

importance of personal chemistry between the negotiators¹⁷⁸. However, several pundits have pointed to the unpopular personality of Brian Mulroney as a key factor in the public's rejection of the Meech Lake and Charlottetown Accords.

We would argue that the personalities of individuals and the unique interpersonal relationships that they forge can and does have a significant impact on the outcome of negotiations, however it is rarely the determining factor. When other conditions are not right, even the most skilled negotiator and charismatic leaders can not achieve a lasting settlement. In a similar vein, Michael Stein argues that "in intergovernmental bargaining situations, the actual social background, class and personality characteristics of actors are less important than the nature and interrelationship of the political roles that they assume,"¹⁷⁹ Compelling evidence for this argument can be drawn from both the South African and the Canadian cases. In South Africa, essentially the same set of actors who had failed to achieve agreement at Codesa eventually succeeded in achieving a negotiated settlement at Kempton Park. The personalities remained the same, however other circumstances had changed.

Similarly, in Canada the positions of the negotiating parties in numerous constitutional rounds have not changed radically despite changes to the rosters of negotiators. As Stein argues, "two successive incumbents of the same political office may develop surprisingly similar bargaining positions despite great differences in their background and personality, not to speak of their party labels and ideological orientations."¹⁸⁰

¹⁷⁸ Loughheed, Peter. "A Canadian Compromise." in Kenneth McRoberts and Patrick Monahan, eds. The Charlottetown Accord, the Referendum and the Future of Canada. (University of Toronto Press: Toronto, 1993), 174.

¹⁷⁹ Stein, 5.

¹⁸⁰ Ibid.

The influence of race and nationality in both cases may have been a complicating factor at the beginning of both negotiations, but we have argued that it became less of a factor as the negotiations progressed in South Africa and that it was not a determining factor in the case of Canada.

Interdependence Factors

The third dimension of factors affecting negotiating and bargaining is the interdependence of bargainers. This involves the relationship between parties (were they acquainted prior to the start of the negotiations, what is the relationship of power and dependency, do the parties expect to have future contact with each other?)¹⁸¹

In terms of interdependence factors, it would seem that South Africa was in a much more difficult situation than Canada. Firstly, the motivation of the negotiating parties was highly disparate and their attitudes towards each other extremely negative. Observers of the South African negotiations have observed that "the ANC and the NP government approached each other from profoundly different positions."¹⁸² While the ANC was negotiating the transfer of power, the NP believed that it was negotiating some form of power-sharing. These opposing motivations made negotiations extremely difficult. Before the negotiations could produce agreements of substance, there had to be agreement on what the negotiations would be about.

It is intuitive that after several decades of violent conflict, the attitudes of the negotiating parties in South Africa would initially be marked by suspicion and tension. Although the hostility between the negotiating parties faded to cordial relations with surprising speed, the tension would re-emerge periodically throughout

¹⁸¹ Rubin and Brown, 38.

¹⁸² Welsh, 23.

the negotiations.

For example, although De Klerk and Mandela had forged a good working relationship through early negotiations, at the opening of Codesa the two men had terse words for each other. De Klerk, who was scheduled as the last speaker of the plenary session, slipped into his speech an accusation that the ANC had failed to honour its commitment to dismantle its guerrilla forces. He then questioned the ANC's ability to enter into binding agreements. Mandela was furious and rose for an impromptu speech in which he described De Klerk as "the head of an illegitimate, discredited, minority regime" and accused him of breaking confidence and of being "less than frank."¹⁸³ This was merely a public indication of a relationship that had been deteriorating for months. The loss of trust between the leaders of the ANC and the NP was a rift that would make negotiations more difficult. Fortunately this was mitigated by the establishment of good relations between the chief negotiators of each party and the members of delegations in working groups and technical committees. The trust that had deteriorated between the leading figures would be rebuilt by the lower ranks.¹⁸⁴

In Canada, the motivations of the negotiating parties have not always been in perfect synchronization, however they have been closer than in South Africa. For example, during the Quebec Round negotiations leading to the Meech Lake Accord, there was general agreement among the parties that the purpose of the negotiations was to achieve Quebec's consent to the 1982 constitution by dealing with five conditions advanced by the provincial government. During the Canada round, the parties knew that they were negotiating a package of constitutional amendments to

¹⁸³Mandela, as cited in Allister Sparks, Tomorrow is Another Country: The Inside Story of South Africa's Road to Change. (University of Chicago Press: Chicago, 1996)

¹⁸⁴ Ibid.

deal with Quebec's demands as well as the concerns of Aboriginal peoples and the Western provinces.

As for the attitudes of the parties towards each other, in Canada they have traditionally been quite cordial. Whether this will continue is another matter. If constitutional negotiations do resume in Canada, they may be far more acrimonious than in the past.

It appears at first glance that the distribution of power between the negotiating parties was more unequal than in Canada. The fact that one of the parties (the South African Government/National Party) could martial the resources of the state and the other was a revolutionary party that had been in exile for the previous decade signals a large power differential. However, if we look beyond access to resources and the power associated with governance, it becomes apparent that the ANC was quite powerful in its own right.

Marina Ottoway argues that "the National Party's strength was institutional control, the ANC's popular support and the Inkatha's ethnic nationalism."¹⁸⁵ She argues that besides control over the government and the security forces, the NP had very few assets due to a small, and steadily decreasing, degree of popular support. The NP's key asset during the negotiations was the fact that "only the NP could keep the institutions, and above all the security forces, under control during the transition."¹⁸⁶

Ottoway argues that the ANC's assets were in its popular support and its ability to bring pressure on the government through mass action such as general strikes.¹⁸⁷ We would argue that another asset of the ANC was the control of its own

¹⁸⁵Ottoway, 159.

¹⁸⁶Ibid, 162.

¹⁸⁷Ibid, 163.

guerilla army, the Umkhonto we Sizwe, which was vital during the struggle and which allowed the ANC to maintain an unspoken threat of violence to counter the South African Government's military forces.

In Canada, some of the negotiating parties have had relatively similar bases of power. The federal government and the ten provincial governments all have popular support behind them. The province of Quebec brings an added element in that it can make a threat of succession that is backed up by a significant, though fluctuating, degree of support. Larger provinces, such as Ontario, British Columbia and Alberta have more power than smaller provinces, such as New Brunswick and Prince Edward Island. They have both more financial resources to devote to negotiations and larger population bases. The federal government is naturally prone to pay more attention to the concerns of provinces in which it can hope to win more votes in the next election.

The parties to the Canada's negotiations that are the least powerful are the aboriginal organizations. They have more power than some organizations in Canada as evidenced by their very presence at the negotiating table, however they are weak compared to the other parties. The aboriginal organizations represent much smaller constituencies than most of the eleven governments and their electoral legitimacy is not as clear-cut. These organizations do not have access to the same financial resources as the governments at the table, nor do they control substantial security forces. The weakness of the aboriginal organizations relative to the other negotiating parties is evidenced by the fact that they can be included or excluded at the whim of the other parties.

Another aspect of interactional factors is the relationship of the negotiating parties. Marina Ottoway argues that in the case of South Africa, the failure of negotiating blocs to develop between each of the two primary negotiating parties and

smaller parties complicated the negotiations. She contends that "the existence of two cohesive blocs could create an atmosphere of confrontation, encouraging both sides to intransigence, while independent organizations could facilitate an agreement by acting as mediators" rather than an atmosphere where many small parties had to be heard under the rules of Codesa and slowed down the process "while failing to provide a bridge or suggest compromises."¹⁸⁸

In the Canadian case, alliances developed between various provinces around certain issues. For example, on Senate reform, the provinces were divided into those who supported a "Triple-E" model (elected, effective, equal representation from all provinces), a group which included Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland, and those provinces that were opponents of the model, namely Ontario and Quebec.¹⁸⁹ On another issue – aboriginal self-government – a quite different set of alliances formed, with Ontario, British Columbia, Saskatchewan, Prince Edward Island and New Brunswick supporting the "inherent right" of aboriginal peoples to self government, while a second group composed of Alberta, Manitoba, Quebec, and Newfoundland was sceptical of constitutionally entrenching this right.¹⁹⁰ What is important to note is that no clear "negotiating blocs" developed. Instead, different alliances formed around different issues. It is particularly interesting to note that although both negotiations were initially seen as means to bringing Quebec into the constitution, the negotiating dynamic was not Quebec against the rest of the country. Instead, Quebec formed parts of alliances with other provinces on various issues.

¹⁸⁸Ottoway, 165.

¹⁸⁹ Monahan, 234.

¹⁹⁰ Ibid, 234.

The most significant success factor in the South African case in terms of the inter-relationship of the negotiating parties involves the perception of the conflict and the "need to move together towards some acceptable outcome."¹⁹¹ One of the main factors in South Africa's relatively peaceful settlement was the belief among both major negotiating partners that there was no alternative to reaching a negotiated settlement. David Welsh argues that the antagonists in South Africa's conflict mutually recognized that they had reach a stalemate and that the conflict could only be continued at an "appalling cost in terms of bloodshed and destruction of the economy." He adds that both sides realized that the alternative to negotiating was civil war. This realization both brought the parties to the negotiating table and prevented derailment of the process despite setbacks along the way.

Steven Friedman notes that the major negotiating partners' "joint commitment to negotiated constitutional change stemmed from the joint realisation that that the very different visions which had informed most of their political lives were unattainable."¹⁹² What Friedman finds remarkable is that both De Klerk and Mandela concluded separately that compromise was unavoidable. Even more remarkable is the fact that both leaders were able to garner the support of their parties for the significant compromises that would be required.

Friedman traces some of the primary factors that led both parties to the conclusion that compromise was inevitable. For the ANC, he points out that the guerrilla war never held a serious prospect of overthrowing the apartheid state and the physical and economic cost of housing ANC bases was becoming unsustainable for neighbouring states. Changes taking place in the Soviet Union, which was unwilling to continue funding military activity also weakened the ANC's prospects of achieving

¹⁹¹Friedman, 1994.

a revolutionary victory. Also, the economic sanctions that were being undertaken by a number of powerful members of the international community at the ANC's urging were not proving to be an effective revolutionary instrument.

The NP also became convinced that the costs of ruling by force were unsustainable in the long term. The economic decline due to sanctions and military costs was taking its toll. Finally, the erosion of soviet power along with the increased respectability of South Africa created by its role in negotiating for Namibian independence lowered the risks of negotiation. Essentially, the costs of not negotiating were steadily increasing, whereas the rewards of negotiating were also on the rise.¹⁹³

In Canada, the costs of not reaching an agreement have been much lower. There was no real concern during the negotiation of or the public debate around either the Meech Lake or the Charlottetown Accords that the nation would erupt into violence if an agreement was not reached. Although there have been isolated instances of rioting associated with Quebec nationalism, one high profile terrorist incident by the Front de Liberation de Quebec (FLQ) in the 1970's, and some violent clashes between security forces and aboriginal protesters, the Canadian conflict has been remarkably peaceful.

The perceived cost of not reaching an agreement during the Canada Round of negotiations was the separation of the province of Quebec to form a sovereign state. After the collapse of the Meech Lake Accord, Premier Robert Bourassa had committed his province to a vote on sovereignty by October 26th, 1992 if a new constitutional proposal addressing Quebec's concerns was not forthcoming. The

¹⁹²Friedman et al, 1994, p. 9.

¹⁹³Friedman et al, 1993, p: 10-13.

negotiating partners were aware that if such a vote was held, the result could very well lead to the disintegration of Canada.

Although the perceived cost of not reaching agreement was not as high for Canada's negotiators as for those in South Africa, Canada's political leaders took the threat of Quebec's separation very seriously. The seriousness with which they approached the negotiations is evidenced in some of the remarkable compromises that were achieved - particularly in the areas of Senate reform and aboriginal self-government.

Summary of Findings – Interdependence Factors

In this study, we have found that interdependence factors in both Canada and South Africa largely favoured a successful negotiation. Rubin and Brown suggest that equal power among bargainers tends to result in more effective bargaining than unequal power.¹⁹⁴ We found that although it would appear that the National Party/South African Government had greater power than the ANC, the ANC was able to marshal the power of public support and the threat that violence could erupt in the townships if the ANC were to lose public confidence. In the case of Canada, we found that the power wielded by the individual provinces was comparable, although more populated provinces are more powerful than small provinces. The Canadian federal government had greater power at its disposal, however in both negotiations the federal government generally used this power to attempt to bring about a resolution rather than to gain concessions for its own purposes.¹⁹⁵

In terms of alliances, we found that cohesive negotiating blocs did not develop in either of the two cases. In South Africa, although the National Party and the ANC

¹⁹⁴ Rubin and Brown, 199.

were the primary negotiating parties, they did not succeed in building cohesive alliances with the smaller parties. In Canada, alliances varied from issue to issue. The lack of cohesive alliances may have complicated both negotiations, however it may have also mitigated the confrontational tendencies that can develop with two opposing negotiating blocs.

We found that the most significant interdependence factor in both negotiations was the commitment of the parties to finding a resolution. In South Africa, this commitment was strong and it kept the negotiating parties at the table through difficult times. In Canada, although the Canadian public was not convinced of the necessity of reaching a settlement, the negotiators themselves were highly motivated and this resulted in some surprising compromises, particularly during the Charlottetown Accord.¹⁹⁶ Rubin and Brown conclude that “a co-operative motivational orientation tends to lead to a more effective bargaining than an individualistic, and especially a competitive motivational orientation.”¹⁹⁷ We would argue that the negotiators in both South Africa and Canada were strongly motivated to achieve a settlement. We will next turn to an examination of whether this positive motivation translated into co-operative or competitive strategies.

Social Influence and Influence Strategies

The fourth dimension of independent variables within the social-psychological model of negotiation in bargaining is the use of social influence and influence strategies within the negotiation process. Rubin and Brown argue that bargainers are

¹⁹⁵ Monahan, 231.

¹⁹⁶ Loughheed, 174-175.

¹⁹⁷ Rubin and Brown, 199.

influenced by information that they obtain about the other bargaining parties and exert influence through the information that they disclose. "It is this exchange of information, the attributions to which it leads, and the ways in which it is shaped for the purposes of mutual social influence, that represents the fundamental strategic issue in bargaining."¹⁹⁸

Rubin and Brown suggest that influence strategies should be examined according to three dimensions: opening moves and gestures, the overall patterning of moves and countermoves and the use of accompanying appeals and demands.¹⁹⁹

The analysis of all of the influence strategies employed by the bargaining parties in the various rounds of constitutional negotiations in which South Africa and Canada engaged would be a mammoth undertaking. For the purposes of this study, we will focus on the question of to what extent the general tone of the strategies and negotiating positions assumed by the parties shaped the success or failure of the negotiations.

In terms of opening moves and gestures, the South African negotiations had a shaky start. Marina Ottoway blames the breakdown of Codesa on her contention that it "was build on the shaky foundations of conflicting goals, misunderstandings and lack of good faith."²⁰⁰ She argues that the ANC entered the process with the goal of translating its popular support into control over the nation's governing institutions, whereas the NP sought to negotiate a power-sharing constitution that would both extend political rights to the black population and provide "ironclad guarantees against whites having to accept the authority of other ethnic groups."²⁰¹ Not only did the goals of the parties conflict on a fundamental level, but both sides were exhibiting

¹⁹⁸ Rubin and Brown, 260.

¹⁹⁹ Ibid., 288.

²⁰⁰ Ottoway, 158.

competitive behaviour. Rubin and Brown conclude that “the early initiation of co-operative behaviour tends to promote the development of trust and a mutually beneficial, co-operative relationship; early competitive behaviour, on the other hand, tends to induce mutual suspicion and competition.”²⁰²

By contrast, the negotiations leading to Canada’s Meech Lake Accord opened with a relatively co-operative tone. As noted above, the five demands outlined by Quebec’s Intergovernmental Affairs Minister in May 1986 seemed to academics and politicians from outside of Quebec to be “a reasonable basis for beginning another round of constitutional discussions.”²⁰³ The counteroffer from the Rest of Canada was developed based on the five demands and was considered generally acceptable by the Quebec government.²⁰⁴ The problem was that this agreement, reached through the elite accommodation model so common in Canadian politics, was out of step with the thinking of the general populous in terms of both the content of the Accord and the secretiveness with which it was negotiated. The co-operative strategy employed by both sides allowed them to achieve an agreement, however the negotiators had not succeeded in building trust with the citizens whom they represented, and thus the Accord was doomed.

The Charlottetown Accord – which we would suggest can be seen as a continuation of the constitutional negotiations that produced the Meech Lake Accord – opened on less congenial terms. After the failure of the Meech Lake Accord, Quebec’s Premier, Robert Bourassa, “raised the ante” by announcing that he would get together with Jacques Parizeau, the separatist leader of the Parti Québécois to consult the Quebec people on a full range of constitutional options, including

²⁰¹ Ibid.

²⁰² Rubin and Brown, 263.

²⁰³ Russell, 1993(1) 134.

²⁰⁴ Ibid, 138.

separation from Canada.²⁰⁵ Canadians outside of Quebec did not appreciate this new stance. To quote one observer “people do not take kindly to negotiating with a knife to their throat.”²⁰⁶ Paired with the continuing resentment in Quebec at the rejection of the Meech Lake Accord by English Canada²⁰⁷, the atmosphere going into the Charlottetown negotiations was negatively charged.

Despite deep cleavages in public sentiment between Quebec and the rest of Canada, the negotiators themselves behaved co-operatively in order to achieve a unanimous agreement. As one former provincial Premier observed, the provincial negotiators realized the consequences of failure to reach an agreement and were under pressure from the federal government to achieve results. “They had the intensity that was required to make a deal...and it worked in a unanimous way.”²⁰⁸

Summary of Findings – Social Influence Strategies

Rubin and Brown concede that while social influence in bargaining is often exerted systematically and self-consciously, the outcomes of bargaining are also shaped in less clear-cut and rational ways. “Unwitting glances, mannerisms and gestures, private fears and fetishes, may be as instrumental in influencing the other as a bargainer’s best-laid, most shrewdly considered strategic plan.”²⁰⁹

Observers of both the South African and Canadian constitutional negotiations have emphasized the complexity of the negotiations and the non-linear fashion by which negotiation proceeds. The influence strategies used varied from round to round and from forum to forum (ie. in working groups versus plenary sessions).

²⁰⁵ Ibid, 155.

²⁰⁶ Leon Dion, as quoted in Russell, 1993(1), 155.

²⁰⁷ McRoberts, 1997, 207.

²⁰⁸ Peter Loughheed, “A Canadian Compromise” in The Charlottetown Accord, the Referendum and the Future of Canada, McRoberts & Monahan, eds. (University of Toronto Press, 1993), 173-75.

²⁰⁹ Ibid.

In both cases, negotiators achieved the greatest success when all parties were behaving co-operatively in pursuit of the common goal of achieving a settlement. When competitive behaviour was exhibited, negotiations tended to come grinding to a halt. Fortunately, in both cases pressure to achieve a settlement resulted in generally co-operative strategies on the part of the negotiators, despite the disparate goals that the parties may have had entering into the negotiations.

Discussion of Findings

Having examined at the historical backgrounds of South Africa and Canada and having applied the social-psychological model to the constitutional negotiations in both countries, we must now attempt to answer the central question set out at the beginning of this study:

Why did South Africa succeed in negotiating a new Constitution whereas Canada has been unable to amend its Constitution despite repeated attempts?

The application of the social-psychological framework yielded some conclusions that will be useful in answering this question. In terms of the negotiations themselves, we found that South Africa had a number of things working in their favour.

South Africa was advantaged in terms of having fewer critical negotiating parties. Particularly with the introduction of the “sufficient consensus” rule at Codesa, negotiations were able to proceed with the agreement of the ANC and the National Party/South African government. In Canada’s case, due to both political necessity and its constitutional amending formulae, the unanimous consent of ten provinces and the federal government was required on the full deal. The consent of the major organizations representing aboriginal peoples was also required for some

key elements of the Charlottetown Accord. The presence of fewer critical parties allowed negotiators to conduct private negotiations in remote areas to resolve key issues – a practice which would be exceedingly difficult in the Canadian context.

Also working in South Africa's favour was the pressure brought to bear on negotiators by the international community. Although there was no successful third-party mediation of the South African conflict, the knowledge that the world was watching and that there would be severe economic repercussions if a deal was not reached, served to keep the NP/SAG at the negotiating table.

Another advantage enjoyed by South Africa was the involvement of charismatic political leaders and negotiators who were committed to reaching a settlement. Beyond the role that these leaders played in reaching a deal, they were also able to maintain the confidence of their constituencies, and thus to "sell the deal" once it had been struck. By contrast, the most memorable political leaders during the Canadian negotiations were those who scuttled the deal, either by speaking out against it (former Prime Minister Pierre Trudeau, for example) or by being so enormously unpopular that their support for the Accords actually gave Canadians a reason not to support them (namely, then Prime Minister Brian Mulroney).

We will argue that, when compared with Canada, the single greatest advantage that South Africa had during its negotiation was the commitment of the parties – both the leaders and the general public – to achieving a negotiated settlement. This commitment led to the use of generally co-operative social influence strategies on the part of the negotiators and ensured public support for the deal once it was reached.

In Canada, the absence of this belief in the unacceptable cost of continuing conflict has manifested itself in a number of ways, which we will discuss in more detail below.

Popular Support

The most significant reason that Canada has failed to reach a constitutional settlement is a failure of the governments and political elites negotiating the settlements to win popular support. Although elites have succeeded in reaching two pacts that they believed would put an end to the conflict, the Canadian populous ultimately rejected both pacts.

The process that produced the Meech-Lake Accord was widely criticized in Canada for being exclusionary, since no public consultation took place and special interest groups were not included as negotiating parties. The Meech Lake Accord was negotiated by teams representing the ten provinces and the federal government and was then presented to the Canadian public in its final form. Provincial legislatures were required to ratify the Accord within a three-year time limit set by the existing Constitution, however no modifications to the Accord were to be considered.

Although this approach to Constitution-making did not sit well with the Canadian public in 1987, it is precisely the way that Confederation was negotiated in 1867 and essentially the manner in which amendments to the Constitution had been discussed ever since. The Confederation agreement of 1867 has been described as "a deal cut between politicians without public consultation and contrary to the wishes of a large part of the population."²¹⁰ One would think that this recipe for constitution-making would not bode well for the future of a nation, however Canada survived with very few modifications to the 1867 Constitution for over a century.

Canadians have never been as enamoured with the concept of popular sovereignty and participatory democracy as Americans have been. As Stephen Brooks argues, "the dominant political tradition has preferred parliamentary

²¹⁰Brooks, 286.

supremacy, responsible government and statism to forms of governance that allow for direct democracy."²¹¹ However, Brooks also acknowledges a subordinate tradition, particularly in the Western Canadian provinces, that has been suspicious of representative government and the British parliamentary system.

Alan Cairns argues that it was the adoption of the Charter of Rights and Freedoms in 1982 that created the expectation that the public will be accorded a major role in any significant constitutional change. He contends that the movement from a *governments' constitution* to a *citizens' constitution* occurred because the Charter encouraged citizens to think of themselves as constitutional actors while at the same time reducing the relative status of governments.²¹²

Stephen Brooks argues that Cairns was only partially correct. He contends that while the Charter did have an impact in the expectations of Canadians with regard to constitution-making, the effect was to give some of the power from governments and political elites not to citizens, but to special interest groups. Canada's constitution-making model has evolved from executive federalism, which entailed intergovernmental negotiation by the governing elites to a system of polyarchy, which includes controlled consultation and negotiation with special interest groups. Brooks argues that the Charter has encouraged special interest groups to emerge and strengthen around the rights set out in the charter. This includes groups organized to speak on behalf of women, the disabled, aboriginal Canadians and ethnic, racial and linguistic minorities.²¹³

²¹¹Ibid, 286.

²¹²Alan Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" in Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McClelland and Steward, 1991), 109.

²¹³Brooks, 291-93.

Brooks makes the argument that the Meech Lake Accord was killed by special interest groups, who objected to both the process that led to the agreement and the contents of the agreement itself. The process leading to the Charlottetown Accord of 1992 was specifically designed to address these concerns. Two years of negotiation and consultation preceded the agreement and special interest groups played an important role in the process.²¹⁴ Brooks argues that this process of consultation represented a polyarchical style of constitution-making rather than a style consistent with true participatory democracy. Public consent was mediated by heads of government plus certain citizens' interest groups in the case of the Charlottetown Accord. It was only in the 1992 referendum that "the public was given a direct role in the constitutional amendment process."²¹⁵

If the Meech Lake Accord foundered due to a gap between what the governments and political elites felt was an appropriate compromise and what the Canadian populous was willing to support, then the failure of the Charlottetown Accord demonstrates that a gap also existed between the perspective of special interest groups and the public will.

In light of the theories advanced by Cairns and Brooks, it will be interesting to see whether South Africa, whose Bill of Rights bears many similarities to Canada's Charter of Rights and Freedoms, creates an expectation among the South African populous that they will play a direct role in any future constitutional change.

While it is important to encourage the development of civil society to ensure the consolidation of South Africa's new democracy, the growth of citizens' interest groups may complicate any future attempts to amend the constitution. South Africa's current amending formula requires the support of 75% of the members of the National

²¹⁴Ibid, 293.

Assembly and six provinces in the National Council of Provinces in order to amend the Bill of Rights, provisions affecting the provinces or the National Council of Provinces, and Section 1, which stipulates that “South Africa is one, sovereign, democratic state” founded on the values of human dignity, non-racialism and non-sexism, supremacy of the constitution and supremacy of the law, and the guarantee of certain electoral principals.²¹⁶ Any other provisions of the Constitution can be amended by a 2/3 vote of the National Assembly.

This amending formula is less stringent than the amending formulae of many other nations, including Canada, the United States, Germany, India and Malawi.²¹⁷ With the ANC currently holding a greater than 2/3 majority (266 of 400 seats – 66.5%)²¹⁸ in the National Assembly, many changes to the Constitution could be achieved with the support of just one political party. That being said, the ANC must ensure that it does not make any unpopular changes that would jeopardize its political legitimacy. As the South African electorate becomes more politically engaged and if they develop an expectation, as has the Canadian populous, that they will be directly involved in any attempt to amend the constitution, the South African government may find it increasingly difficult to advance major constitutional reforms.

A parallel can be drawn to South Africa's constitutional negotiations, which proceeded according to a model of elite accommodation. Despite the fact that South Africa's negotiations were undertaken by elites with no formal public consultation, the need to maintain public confidence in the negotiations remained a concern for the negotiators. To give one example, the negotiators were concerned about the impact of

²¹⁵Ibid, 293.

²¹⁶ South African Constitution. (South Africa, s. 74(1))

²¹⁷ Kory McDonald, “The Amending Formulae of Six Countries: A Comparative Perspective.” Unpublished paper submitted to Professors Christina Murray and Richard Simeon, 1997.

²¹⁸ Current State of Parties in the National Assembly, Sept. 4, 1999.
<http://www.polity.org.za/govdocs/parliament/index.html>

mounting violence on public confidence in the negotiations. As Mark Shaw states, "violence became a negotiating issue as the parties sought to show that they cared about it and could prevent it."²¹⁹ Hopefully as the new South African state matures and South Africa's democracy is consolidated, the threat of violence will be replaced in the minds of policy-makers with the threat of loss of political support (and loss of votes). If South Africans become politically engaged in the realm of constitutional politics, those wishing to amend the constitution may find that they are constrained not just by the legal amending formula set out in the constitution, but also by public expectations around the level of consultation, and possibly ratification.

Ratification Process

One of the most problematic aspects of the Canadian case was the judgement of negotiators as to the needs and expectations of the groups that they represent. Both the Meech Lake and Charlottetown Accords represent a discord between what the negotiators thought would be acceptable to their constituencies and what their constituents were actually willing to accept. As Richard Johnston argues, the negotiators thought that "they had finally found an equilibrium, a logroll sufficiently inclusive to survive referral to the people...they may have overestimated both how much each group wanted what it got and how intensely some groups opposed key concessions to others."²²⁰

Since the South African constitutional settlement was not subject to ratification through a national referendum, the negotiators were not faced with the necessity of convincing their constituencies to accept all of the provisions of the

²¹⁹Mark Shaw, "The Bloody Backdrop" in *The Small Miracle*, 182.

negotiated settlement. Nonetheless, due to the possibility of civil unrest, violence or mass emigration, the negotiators were compelled to ensure that the main elements of the settlement would be acceptable to most segments of the population.

We would argue that in South Africa, the populous was satisfied with a negotiated settlement that they believed was far better than the alternative of continuing uncertainty and unrest. South Africans were willing to let their leaders negotiate a settlement that may be flawed and may hold disadvantages for one group or another, but that would be for the good of the country. By contrast, the Canadian populous would not support a deal that they felt was less than ideal, since they were not convinced that the consequences of failure to achieve a new constitution would have a significant impact on their lives.

Canada's case clearly demonstrates the point that the degree of consent required for constitutional amendment can go beyond that which is outlined in the amending formula of a nation's constitution.

Political circumstances in Canada forced a reluctant federal government to institute a referendum process to ratify a major package of constitutional reforms. The provincial governments in Quebec, British Columbia and Alberta had already committed to holding referenda on the new constitutional package and it was considered politically unpalatable to give some Canadians, but not others, a vote on major changes to the constitution. Additionally, the fact that polling indicated support for the Accord among a majority of Canadians gave the federal government reason to believe that the outcome of the referendum could be a positive one.

To be more precise, the 1992 referendum was not legally binding on the federal government, and is thus more appropriately termed a plebiscite.

²²⁰Johnston, 43.

Wordsmithing aside, it is virtually inconceivable that the federal government could have disregarded the results of the referendum and proceeded with a constitutional package that did not receive widespread support from the Canadian populous. Although there was no set rule for what degree of support would be required, the general consensus was that a majority vote in both Quebec and the rest of Canada would be an absolute necessity and that it would be very difficult to proceed without majority votes in every one of the ten provinces.

Although referenda were never a part of Canada's constitutional amending formula, it is now agreed by most commentators that the 1992 referendum "created a precedent: Canadians must be consulted directly before political leaders attempt to alter the country's basic document."²²¹ Many analysts, while lauding this development as a positive step for democracy, see it as a potentially large stumbling block in future constitutional change for Canada.²²²

A further complication for Canada is that while a national referendum has been added to the amending formula through precedent, the formula that appears in the constitution requires the consent of provincial governments. For most constitutional provisions, either all of the provinces or 7 provinces representing 50% of the population must agree. This means that any successful constitutional package must appeal both to the general electorate and to the provincial governments. Richard Johnston argues that the problem with this scenario is that it is unlikely that the electorate will accept any proposal that makes it through the ministerial process and it

²²¹Jeffrey Simpson, "The Referendum and Its Aftermath" in *The Charlottetown Accord, the Referendum and the Future of Canada*, Kenneth McRoberts and Patrick Monahan, eds. (University of Toronto Press: Toronto, 1993).

²²²see Johnston, 43-48.

is just as unlikely that governments would accept a package that the electorate would be likely to approve.²²³

South Africa did not find itself in this conundrum upon conclusion of its constitutional negotiations. The prospect of a referendum was discussed during the negotiations, however it was not selected as a ratification device. One of the major issues under discussion at Kempton Park was the issue of what mechanism would be employed to break constitution-making deadlock during the drafting of the permanent constitution. It was decided that if the elected constituent assembly failed to approve a proposed constitution by a two-thirds majority, the constitution would be put to a national referendum, where it would be subject to a 60% threshold for approval.²²⁴ Rather than an ordinary ratification device, a referendum was seen as a means of breaking a deadlock if the constitution-making process were to go awry.

It is interesting that the negotiators chose to include in their interim constitution the requirement that a constitutional proposal lacking sufficient support from the elected members of the constituent assembly be submitted to the electorate for approval. This would seem to reverse the Canadian precedent, whereby a constitutional package with the unanimous support of all 11 governments is then submitted to the public for ratification.

The Inkatha Freedom Party (IFP) also suggested the use of a referendum to ratify the new constitution. The IFP suggested that the permanent constitution be drafted before an election. The constitution would be submitted to all parties for approval and would then be subject to a referendum question during the first national vote. The IFP argued that this process would be "more democratic, more pragmatic

²²³Johnston, 47-48.

²²⁴Atkinson, 100-101

and less conflict-prone." ²²⁵ The IFP's proposal would also have allowed even very small parties to block a constitution, since all parties would have to approve it before it was submitted to the electorate.²²⁶ The ANC and the SAG rejected this proposal in favour of an agreement that the permanent constitution would be drafted by an elected body.

Ironically, the only referendum that took place during South Africa's negotiation of a new multi-racial democratic regime was a whites-only vote. When faced with a challenge from the right, F.W. de Klerk held a referendum in March 1992 to secure a mandate from the white population to negotiate. This has been viewed as a tactic that both gave De Klerk an unequivocal mandate to negotiate and made it easier for the parties to not submit the final constitution to a referendum (particularly to a whites-only referendum). As Ottoway argues, "it would be easier for the government to receive the approval of the white electorate on the basis of broad and vague principles than on the basis of a concrete constitution embodying inevitable compromises."²²⁷ The fact that the referendum was only on De Klerk's mandate to negotiate on their behalf and not on a constitution that would apply to the entire population, allowed the ANC to accept the referendum as a "whites-only" vote.²²⁸ Earlier in 1992, De Klerk had declared that the constitution would be submitted to a referendum in which white votes would be counted separately from the votes of other population groups, however this was forgotten in the wake of the March 1992 referendum victory.

²²⁵Gavin Woods, *Business Day*, 12/2/93, as cited by Atkinson, 17.

²²⁶Atkinson, 17-18.

²²⁷Ottoway, 161.

²²⁸*Ibid.*

Constitutionalism

One of the results of the failure of numerous rounds of constitutional negotiations in Canada is scepticism among the populous about the ability of constitutions to resolve conflict and the emergence of what has come to be known as “constitutional fatigue”. Some observers have asked whether Canada’s commitment to constitutionalism is waning.

Constitutionalism has been defined as the belief “that the government to be instituted shall be constrained by the constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes.”²²⁹ For the purposes of this study, another definition of constitutionalism will also be useful. Stephen Brooks defines it as “the effort to find constitutional solutions to some of the country's political problems.”²³⁰ Both of these definitions emphasize the importance placed on the constitution by the actors (including the populous, political elites and governments) of a given nation.

In Canada, the commitment to constitutionalism as defined in the first definition above has always been strong. The founders of Canada were united in their concern about unmitigated democracy. They sought to protect minority rights, particularly language and religious rights. The BNA Act, 1867, contains provisions to protect the both the use of minority official languages in Quebec and the rest of Canada and the existence of denominational schools for religious minorities.

South Africa has also demonstrated support for the concept of constitutionalism as a restriction on majority rule. One of the first principles to be established in the negotiations was a commitment to establishing a regime based on

²²⁹Louis Henkin, as cited by Pierre J. J. Olivier, “Constitutionalism in the New South Africa” in *South Africa's Crisis of Constitutional Democracy: can the U.S. Constitution Help?* (Washington: the AEI Press, 1994), 19.

constitutionalism. This was by no means a foregone conclusion, since South Africa had operated as an authoritarian state for much of its history. The National Party, which emerged early in the negotiations as a champion of constitutionalism "had a history of cavalier treatment of constitutions."²³¹ The NP had by-passed the constitution in the 1950's to disenfranchise coloured voters and in the late 1970's had replaced the constitution, despite widespread existence, in order to introduce the controversial tricameral system. When it found itself on the brink of some form of majoritarian rule, however, the NP embraced constitutionalism as a means of protecting its minority interests.

The ANC also demonstrated a surprising willingness to accept the principle that the decision-making power of the government would be limited by the constitution. Some observers have credited this perspective to the ANC's long-standing commitment to political rule-making and its participation in a previous attempt (the 1955 Freedom Charter) to set out how governments may and may not exercise power.²³² Doreen Atkinson argues that "constitutionalism was born out of the ANC's willingness to constrain majority rule, as long as the NP abandoned its demand for veiled racial privilege."²³³

Despite the commitment on both sides of the South African conflict to the general principle of constitutionalism, one of the major tensions during the negotiations was between the emphasis of minority rights by the NP and the insistence on majority rights by the ANC. South Africa's history dictated that the concepts of minority rights and majority rule would be politically charged to an extent unknown in Canada.

²³⁰Brooks, 271.

²³¹Atkinson, 92.

²³²Atkinson, 93.

In Canada, the major tension during constitutional negotiations has been a fundamental disagreement on the foundation of the intent and origins of the 1867 constitution. It is seen by some as a "compact" between two nations, English Canada and French Canada, and by others as a "contract" between ten equal provinces. These opposing viewpoints colour how Canadians in different parts of the country interpret constitutional proposals. Regardless of their positions on the origins and intent of the constitution, however, Canadians have traditionally placed great importance on the constitution and support the idea that governments must be constrained by it.

Where constitutionalism has been waning in Canada in recent years is in the belief that constitutional change is the best, or even a possible, solution to the country's political problems. Brooks argues that constitutionalism has not only failed in Canada, it has "exacerbated the problems it was supposed to solve."²³⁴ He contends that the process of constitutional reform became out of control in Canada when too much was demanded of the reform process from too many groups. Canada has now come to a point where much of the populous has no desire to consider constitutional reform in the near future. Whether this "constitutional fatigue" is a temporary or an enduring feature of the Canadian political landscape remains to be seen. What is certain is that Canadian constitutionalism has evolved to a more populist form. Canadians are no longer satisfied to leave complex constitutional issues to their political elites. They expect to be consulted on major constitutional change and to have the final say on whether it is adopted.

South Africa's constitutionalism does not appear to have saturated the South African populous to the same extent. In the drafting of their new constitution, South Africans were content to leave the negotiation to their political elites and to trust that

²³³Ibid, 93.

consultation would take place within the political parties at the negotiating table. The fact that neither widespread public consultation nor a general referendum took place and that there was no public outcry over the absence of these mechanisms is evidence that the South African population has embraced an elite-driven rather than a populist model of constitutionalism.

The fact that South Africa is a new, unconsolidated democracy makes it even more crucial that the commitment to constitutionalism extends beyond political elites. In times of crisis, constitutionalism must run deep. As Olivier states, "the viewpoint that popular majorities should be constitutionally constrained is put to the test in the case of constitutional emergencies and political violence."²³⁵ As long as South Africa's democracy remains unconsolidated, the commitment of the general populous to the principles set out in the constitution will be tenuous at best. There is a major education effort to be undertaken in South Africa to ensure that the population is aware of and supports the principles contained in the constitution.

²³⁴Brooks, 271.

²³⁵Olivier, 23.

CHAPTER SIX – CONCLUSION

In light of what we have found about the reasons that South Africa succeeded in reaching a negotiated constitutional settlement to its conflict, while Canada has been unable to do so, it is worth turning briefly to the question of what the two nations can learn from each others' experiences.

What can Canada learn from South Africa?

What do these observations tell us about the way forward for Canada? Following the defeat of the Charlottetown Accord, there were essentially three schools of thought in Canada with regard to the question of how to proceed.

Jeffrey Simpson, a syndicated political journalist, ably expresses the views of one school of thought,

"the most urgent lesson from the referendum, the previous constitutional failures, and the cleavages these efforts exposed is not that a new process, or this or that wording change or some new constitutional formula, or a rehash of an old one will produce constitutional peace, but that the search itself through the venue of formal constitutional change is too difficult, treacherous and divisive to be attempted again."²³⁶

The conclusion of proponents of this mode of thought is that the pressures facing Canada can be resolved without making constitutional amendments. The argument is that the amendment process itself is deeply divisive and should be avoided at all costs. This is essentially a rejection of constitutionalism and an appeal for conflict resolution by other means.

Another school of thought is that an extended reprieve from formal constitutional change is required to combat the "constitutional fatigue" that has

²³⁶ Jeffrey Simpson, "The Referendum and Its Aftermath" in The Charlottetown Accord, the Referendum and the Future of Canada. Kenneth McRoberts and Patrick Monahan, eds. (University of Toronto Press: Toronto, 1993), 198.

befallen both the political elites and general populous in Canada. Proponents of this point of view argue that major constitutional change is simply not possible for the next several years, however they acknowledge that at some point, when it is confronted with a direct threat to national unity, Canada will once again return to the constitutional negotiating table. Peter Russell, for example, argues that mega-constitutional politics will resume if Canada finds itself in a real, not an apprehended crisis of national unity. One scenario he proposes is that if the Parti Quebecois were to win a referendum on some form of sovereignty for Quebec, mega constitutional politics will resume and will take on a much more confrontational style than in the past.²³⁷

Yet another school of thought contends that constitutional change is not possible for Canada because the demands of various groups are fundamentally incompatible and the Canadian electorate has not demonstrated a willingness to compromise their own perceived interests for those of the country as a whole. They argue that Quebec will never be fully satisfied with non-constitutional change and the Rest of Canada is not prepared to make the constitutional concessions that would satisfy Quebec's minimum requirements. Proponents of this point of view see the separation of Quebec as inevitable.

A worrisome trend for federalist forces has been the growing sentiment outside of Quebec that perhaps everyone would be better off if Quebec decides to separate. Despite an outpouring of support and emotion from the rest of Canada during the 1994 referendum campaign, Canadians outside of Quebec have been reluctant to transfer their desire for national unity into constitutional concessions for Quebec. Although it is not voiced by the political elites, there is a section of the

²³⁷ Russell, 1993(2), 36.

population, particularly in Western Canada, that believes that enough has been done to satisfy Quebec's demands over the years and if Quebecers are not yet satisfied they should separate from Canada.

As pessimistic as these views of Canada's future are, we can not help but see hope in South Africa's experience. Intractable though Canada's situation may be, many observers felt a few years ago that South Africa's conflict would inevitably end in civil war. Instead, South Africa reached a negotiated settlement. What can Canada learn from this?

One of the lessons that Canada can take from South Africa's experience is the importance of negotiating the parameters for the actual constitutional negotiations in advance. In Canada, it has been left largely to the federal government to informally consult with the provinces and decide upon the structure for negotiations. This has led to one negotiation which was designed to ensure the greatest chance of reaching a compromise, but which entirely ignored the need for input from the general public, interest groups, and even senior government officials (Meech Lake). And one negotiation which was designed to ensure both compromise and public input, but which became forced into a messy - and eventually fatal - ratification device, a national referendum (Charlottetown).

South Africa expended nearly as much time and energy deciding how the constitution would be negotiated, what the guiding principles of the constitution would be and in devising strategies for avoiding deadlock than in the negotiation of the constitution itself. It is this groundwork which Canada will have to pay strict attention to if it is to enter into another round of constitutional negotiations. It is not sufficient for the federal government to devise a structure for the negotiations which it feels holds the greatest chance for success. The negotiating structure, the scope of

issues to be negotiated, and particularly the ratification device to be employed once a settlement is reached, must all be the subject of extensive pre-negotiations with the presence of all negotiating parties and the input of interest groups and the public.

These pre-negotiations must include what Pierre Du Toit calls "meta-bargaining" or "bargaining about bargaining", which produces "a joint commitment by all contenders to the view that the conflict cannot be won by either party on its own terms but instead, that a mutually profitable, and therefore mutually acceptable, settlement should be sought."²³⁸ Both Horowitz and Du Toit argue that this metabargaining process is essential in severely divided societies.

What can South Africa learn from Canada?

Although in conducting this study our primary intention was to find hints for Canada in South Africa's apparent success, we found in conducting the research that South Africa may yet face some of the same problems that Canada has dealt with. This leads us to the question of what South Africa can learn from Canada's experience with constitutional malaise.

A major source of Canada's failure to achieve a constitutional settlement has been an unwillingness of the public, and even provincial legislatures in some instances, to ratify agreements reached by governments and political elites. There is currently a discord between how elites perceive the conflict and the options for settlement and public attitudes.

South Africa chose not to go the route of ratification by referendum and instead chose a relatively simple process of ratification through the national assembly. Although this ensured a swift end to the arduous process of reaching a negotiated

²³⁸Du Toit, as cited in Horowitz, 34.

settlement, it may have consequences as South Africa's democracy consolidates and matures. There may be public desire to revisit components of a constitution that was never formally approved by the electorate.

As much as the achievement of a negotiated settlement and the drafting of a new Constitution in South Africa was a "small miracle", it may not be a lasting one. In this essay we have argued that two of the most significant factors in South Africa's success were the perception of the grave consequences of not reaching an agreement and the fact that the constitution was not submitted to a popular referendum for ratification. These very success factors may create great problems for South Africa in the future.

Already there are signs of discontent and uncertainty within the New South Africa. The passage of the Constitution did not eliminate the sources of conflict within the country. It entrenched some of the enormous changes that South Africa has undergone since the release of Nelson Mandela and the unbanning of the ANC. A Liberal Democratic regime based on majority rule with some protections for minority rights was established on paper. Whether democracy will be consolidated and whether the institutions set out in the new constitution will be sufficient to contain any future conflicts only time will tell.

Ironically, if South Africa's democratic regime does become consolidated and if the conflict is suppressed for a considerable length of time, the conditions may become ripe for megaconstitutional politics to begin again. As the consequences of disagreement lessen and democracy takes hold, South Africans may begin to question the constitutional order and seek constitutional change.

Should the time for major constitutional amendment arise, what can South Africa learn from Canada's example? The first lesson should be that the degree of

required consent dictated by the amending formula is not always sufficient. Often political circumstances or historical precedents necessitate agreement beyond the constitutional amending formula.

In Canada, the use of a national referendum as a ratification device for the Charlottetown Accord became a political necessity due to the public perception of the closed process leading to the Meech Lake Accord. Although referenda do not form part of Canada's amending formula, they are now a virtual necessity for major constitutional change. Additionally, the linkage of issues has made minor constitutional change virtually impossible in Canada. For the foreseeable future, any effort to negotiate amendments in one area will lead to the negotiating parties calling for amendments to other areas of the constitution, and thus a return to megaconstitutional politics.

South Africa has tried to avoid the interprovincial battles that Canada has undergone by severely limiting the role of provinces in its amending formulae. This is indicative of a much weaker brand of federalism. Most sections of the South African Constitution can be amended without any provincial consent - with a two-thirds majority of the members of the National Assembly. For Chapter 2 (Bill of Rights), provisions affecting provinces or the National Council of provinces, and Section 1, which stipulates the principles on which South Africa is based, are subject to approval by 75% of the members of the National Assembly and 6 provinces, as determined by a vote in the National Council of Provinces. If provinces develop into significant political units, it may become necessary - despite the formal amending formula - to ensure that most or all of the provinces consent to major constitutional change. It may be more important to secure the agreement of some provinces than others.

As South Africa's democracy matures, the electorate may demand to be consulted directly on any future constitutional changes. The increasing significance of civil society may also create a demand for consultation of organizations representing certain interests.

In summary, South Africa should be cognizant of the fact that although elite accommodation was an appropriate model for the negotiated settlement and new constitution, a more inclusive model may become necessary if constitutional amendment is contemplated.

One of the greatest challenges to be faced by both Canada and South Africa in the future is how to balance the democratic requirement to consult with the public on matters of major constitutional change with the complications that public involvement can present to constitutional negotiations. Studying democratic transitions, Stanford University Professor Terry Karl concludes that too much public involvement can result in "birth defects".²³⁹ We would propose that the same may hold true for constitutional amendment. However, Canada provides evidence that public consent can not be taken for granted in the quest to reach compromise.

Implications for Future Research

At the beginning of this work we pointed out a number of limitations to this study, including the small number of cases, the fact that a single theoretical framework was applied and the need to isolate a manageable number of variables in extraordinarily complex phenomena. These are common limitations of comparative works and we have argued that despite these limitations it is possible to conduct

²³⁹ Karl, 139.

worthwhile research of complex phenomena through comparative research by focussing on a limited number of variables and raising research questions to be taken up by future researchers in order to complete the picture.

Although the social-psychological framework is useful for the examination of the negotiations themselves, in order to answer the central research question, it was necessary to consider the relationship of political elites to the general public. The application of an alternative theoretical framework allowing for a more direct focus on this relationship would undoubtedly yield further interesting results.

Further comparative research involving other cases of constitutional negotiation, both success and un-successful, is also warranted. Nations like Canada that have struggled with constitutional deadlock for so many years are in danger of concluding that their conflicts are irresolvable. Through observing the experiences of other countries we can see that if the will is there on the part of the elites and the masses, “small miracles” can happen.

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